DUE PROCESS IN PRISON: PROTECTING INMATES' PROPERTY AFTER *SANDIN V. CONNER*

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In 1995, the Supreme Court, in Sandin v. Conner, *altered the standard by which federal courts determine when due process attaches to prisoners' liberty interests. This new standard recognizes prisoners' liberty interests only upon a showing of an "atypical and significant" deprivation, thereby significantly curtailing the ability of prisoners to claim due process violations of liberty interests. Since then, federal courts have disagreed on whether the new standard should extend to prisoners' property interests. This Note examines the circuit split on the application of* Sandin v. Conner *to prisoners' property interests and argues that, while the* Sandin *standard may be appropriate as applied to liberty, it should not extend to property. Part I explains the development of due process protections both within and without the prison context before turning to the Supreme Court decision,* Sandin v. Conner. *Part II examines the split among the circuits concerning* Sandin*'s application to inmates' property interests under the Due Process Clause. Finally, Part III argues that in light of the differences in the development of due process protections for liberty and those for property, as well as the* Sandin *Court's analysis,* Sandin *should be limited to liberty interests, as the standard does not logically apply to property.*

INTRODUCTION

Courts continuously struggle to determine which constitutional rights prisoners retain upon incarceration. In the due process context, federal courts for many years simplified this question by recognizing only those liberty and property interests created by state statutes and regulations.[1] Courts originally devised this state-created interest doctrine outside of the prison context to recognize new forms of property, such as government benefits.[2] In free society, courts thereby created a distinction between property rights, found in statutes and regulations, and liberty rights, found directly in freedoms guaranteed by the Constitution. Within prisons, however, courts looked to statutes and regulations to de-

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1. See Wolff v. McDonnell, 418 U.S. 539, 556–57 (1974) (looking to state law to hold prisoner had liberty interest protected by Due Process Clause).

2. See Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (recognizing "[m]uch of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property"). See generally Charles A. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1254–56 (1965) [hereinafter Reich, Individual Rights] (discussing judicial recognition of due process protections for emerging property concepts, including government benefits).

fine the contours of liberty as well as property. While courts did not aim to create new forms of liberty, by allowing state law to define prisoners' liberty interests, courts were able to avoid the difficult task of delineating prisoners' remaining liberty interests after incarceration.[3]

However, in 1995, the Supreme Court created a new standard in *Sandin v. Conner* that recognized a right to due process for a violation of prisoners' liberty interests only upon a showing of an "atypical and significant" deprivation.[4] Since then, a circuit split has developed over whether *Sandin*'s approach should apply to prisoners' property interests or whether the state-created interest doctrine should continue to apply to property.[5] While the majority of circuits have favored limiting *Sandin* to liberty interests, the few that have applied *Sandin* to property have all but eliminated prisoners' rights to due process protections of those interests.[6]

This unresolved circuit split is a significant problem, given the number of individuals incarcerated in American prisons today and the important role of due process as a protection against arbitrary government action. In 2010, over two million individuals were incarcerated in federal and state jails or prisons—a rate of approximately 714 per 100,000, or one in every 140 Americans.[7] Given the large percentage of individuals potentially affected by the applicability of the heightened *Sandin* stand-

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3. See Susan N. Herman, The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court, 59 N.Y.U. L. Rev. 482, 485 (1984) [hereinafter Herman, New Liberty] (discussing federal courts' desire to avoid defining prisoners' due process rights).

4. 515 U.S. 472, 484 (1995) (holding deprivation of prisoner's liberty will only give rise to due process claim upon showing of "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life").

5. Compare Bulger v. U.S. Bureau of Prisons, 65 F.3d 48, 50 (5th Cir. 1995) ("[*Sandin*] did not instruct on the correct methodology for determining when prison regulations create a protected property interest."), with Cosco v. Upholff, 195 F.3d 1221, 1223 (10th Cir. 1999) (applying *Sandin* to property and concluding "we do not see how the Supreme Court could have made clearer its intent to reject the *Hewitt* analysis outright in the prison context").

6. See infra Part II (discussing circuits' differing approaches); see also infra note 269 and accompanying text (discussing possibility *Sandin*'s extension would eliminate protections for prisoners' property).

7. Lauren E. Glaze, Bureau of Justice Statistics, Correctional Population in the United States, 2010, at 3 tbl.1 (2011), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf (on file with the *Columbia Law Review*). While the above number includes prisons and jails, the number of prisoners in federal and state prisons alone is approximately 1.6 million. Paul Guerino, Paige M. Harrison & William J. Sabol, Bureau of Justice Statistics, Prisoners in 2010, at 1 (2011), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf (on file with the *Columbia Law Review*). This is an overall decrease of 5,575 prisoners from 2009. Id.; see also Roy Walmsley, King's Coll. Int'l Ctr. for Prison Studies, World Prison Population List 1 (8th ed. 2009), available at http://www.prisonstudies.org/images/downloads/wppl-8th_41.pdf (on file with the *Columbia Law Review*) (demonstrating United States has highest prison population and rate of incarceration in the world).

ard, there is pressing need to resolve the uncertainty that the circuit split has created surrounding prisoners' rights to due process protections.

The exceptional importance of due process in prisons magnifies the need to resolve this circuit split. The closed nature of prisons and the relative powerlessness of inmates lead to a high potential for abuse, mistreatment, retaliation, and arbitrary or malicious action.[8] Further, property interests that may seem insignificant to free individuals are of "heightened concern" when viewed in the context of the deprivations imprisonment already entails.[9]

Given the importance of due process to prisoners and the unsettled state of the law surrounding prisoners' property interests, this Note argues that while *Sandin*'s analysis may be appropriate to determine the scope of prisoners' liberty interests, it should not extend to property interests, which find their roots in independent sources of law.[10] An analysis of the traditional distinctions between liberty and property interests, as well as the Supreme Court's reasoning in *Sandin*, supports this conclusion.[11] Part I outlines the development of due process protections both outside and inside of prisons before turning to the Supreme Court decision *Sandin v. Conner*.[12] Part II examines the split among the circuits concerning *Sandin*'s application to inmates' property interests under the Due Process Clause. Finally, Part III argues that *Sandin* should be limited to liberty interests, as its analysis does not logically apply to property.

I. EXPANSION OF DUE PROCESS PROTECTIONS

Due process rights, created to protect individuals from deprivations of life, liberty, and property, are necessarily evaluated differently in the prison context. In prison, lawful incarceration has already curtailed a prisoner's liberty and the prison's controlled environment necessitates

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8. See The Supreme Court, 1982 Term, 97 Harv. L. Rev. 70, 103, 111 (1983) (stating prisoners are "one of the classes of persons most in need" of Fourteenth Amendment protections because "in the closed world of a prison, . . . prisoners are very likely to be subjected to illegitimate administrative action"); see also Scott F. Weisman, Note, *Sandin v. Conner*: Lowering the Boom on the Procedural Rights of Prisoners, 46 Am. U. L. Rev. 897, 898 n.2 (1997) ("Because prisons are relatively hidden from public view, the potential for abusive state practices is immense.").

9. See Bell v. Wolfish, 441 U.S. 520, 574–75 (1979) (Marshall, J., dissenting) (observing that "[d]enial of the right to possess property is surely of heightened concern" because it is a severe discomfort to do without personal items [as] . . . '[t]he strong dependence upon material things . . . gives rise to one of the deepest miseries of incarceration—the deprivation of familiar possessions.'" (last two alterations in original) (quoting United States ex rel. Wolfish v. Levi, 439 F. Supp. 114, 150 (S.D.N.Y. 1977))).

10. See infra Part III (arguing *Sandin*'s methodology does not apply to property context).

11. See infra Part III.A.2 (discussing traditional distinctions between property and liberty).

12. 515 U.S. 472 (1995).

other restrictions as well.[13] Therefore, to analyze the suitability of the methods courts have chosen to evaluate prisoners' interests, it is helpful to first understand the development of due process both within and without the prison context. Courts recognize that while property interests in free society are created by federal and state statutes and regulations (that is, nonconstitutional law), liberty remains defined by the broad guarantees of the Constitution.[14] Within prisons, however, the analyses merged for many years. Courts looked to nonconstitutional law to determine both liberty and property interests.[15] This framework applied until 1995, when the Supreme Court, in *Sandin v. Conner*, heightened the threshold for prisoners' liberty interests by creating a standard that only protected prisoners from deprivations that were both "atypical" and "significant."[16] However, the Court left open the question on which this Note focuses: whether this new analysis should also apply to property interests.

Part I.A first traces the development of due process generally. It discusses the distinction between liberty interests and property interests and the expansion of due process protections for new forms of property. Part I.B then turns to the application of due process in prisons, and the decision of courts to merge the liberty and property analyses in the prison context. Finally, Part I.C analyzes the Supreme Court decision *Sandin v. Conner* and its effects on prisoners' due process rights.

A. *Expanding Due Process's Life, Liberty, and Property: A Theory of Entitlement*

Under the Fifth and Fourteenth Amendments, no person shall "be deprived of life, liberty, or property, without due process of law."[17] The due process analysis has two parts: (1) did a deprivation of life, liberty, or property warranting due process protection occur, and (2) what amount

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13. See 2 Michael B. Mushlin, Rights of Prisoners § 10:1, at 420 (4th ed. 2011) ("[P]rison officials must regulate all aspects of prison life . . . to ensure the safety of the institution and its inhabitants . . . ."); Georgetown Law Journal, Annual Review of Criminal Procedure 927 (35th ed. 2006) ("Criminal convictions and lawful imprisonment function to deprive citizens of their freedom and many other constitutional rights . . . ."); see also Price v. Johnston, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.").

14. See infra Part I.A (discussing development of due process generally).

15. See infra Part I.B (discussing development of due process in prisons).

16. See infra Part I.C (discussing *Sandin v. Conner* and its effects on prisoners' due process rights).

17. U.S. Const. amend. V; id. amend. XIV, § 1. Due process serves many values, including protecting against arbitrary government action, ensuring accuracy, encouraging fairness of process, and protecting personal dignity. See Arlo Chase, Maintaining Procedural Protections for Welfare Recipients: Defining Property for the Due Process Clause, 23 N.Y.U. Rev. L. & Soc. Change 571, 588–89 (1997) ("[T]he basic goals of due process . . . include improving the accuracy of government decisions, creating fair administrative processes, and fostering values of participation and dignity.").

of process is required to protect that interest?[18] Before the 1970s, due process protected only a narrow category of core traditional rights, including property earned through an individual's own labor (for example, money or a house) and the forms of liberty recognized in the Bill of Rights.[19] However, in the 1970s, courts expanded their definition of property to include "new property"—benefits provided by the government pursuant to statutes and regulations. As jurisprudence around "new property" developed, the due process analysis developed two distinct frameworks: one for property interests defined by statutes and regulations and the other for liberty interests created by the Constitution.

1. *Rationale for the Separation of the Liberty and Property Analyses.* — To understand why property and liberty interests require these separate analyses, it is helpful to first look at why "property" is protected by the Due Process Clause at all. Property, present with life and liberty in the Due Process Clause, has always been viewed as a significant element of individual freedom. The ability to secure possession gives individuals the will and means to act independently by giving them the power to control what they possess.[20]

Though equally protected by the Due Process Clause, distinctions between liberty and property rights have always existed. For example, while liberty exists to protect individuals "only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life," allowing individuals to maintain independence and dignity by demonstrating respect for an owner's autonomy.[21] Further, liberty is generally considered to be a "negative" conception arising directly

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18. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due."). This Note focuses on the first question, determining whether a protected property interest exists. See also Donna H. Lee, The Law of Typicality: Examining the Procedural Due Process Implications of *Sandin v. Conner*, 72 Fordham L. Rev. 785, 793 (2004) (describing "familiar two-step process of determining whether there was a due process interest at stake, and then what process was due").

19. Richard J. Pierce, Jr., The Due Process Counterrevolution of the 1990s?, 96 Colum. L. Rev. 1973, 1974 (1996). During this period, courts also distinguished "rights," which were entitled to due process, from "mere 'privileges,'" such as government benefits, employment, or licenses governed pursuant to a statute or regulation. Id.; see, e.g., Barsky v. Bd. of Regents, 347 U.S. 442, 451 (1954) ("The practice of medicine . . . is a privilege granted by the State . . . ."); Bailey v. Richardson, 182 F.2d 46, 59 (D.C. Cir. 1950) ("The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ."); see also Laurence H. Tribe, American Constitutional Law § 10-8, at 678–82 (2d ed. 1988) (explaining development of procedural due process prior to 1970s). However, in 1972, in *Board of Regents v. Roth*, the Court "fully and finally rejected the wooden distinction between 'rights' and 'privileges,'" ending this type of analysis. 408 U.S. 564, 571 (1972).

20. See Charles A. Reich, The New Property, 73 Yale L.J. 733, 771–72 (1964) [hereinafter Reich, New Property] (discussing value of protections for property in society).

21. Id. at 771.

from the Constitution.[22] It encompasses a right to be left alone, free from governmental interference. By contrast, property interests by their very nature are "located in some other source, principally state law," and often involve positive rights that obligate the government to take action to provide protections.[23] In protecting these interests, the Due Process Clause intended to simply "thr[ow] a federal constitutional shield around property interests initially created by state law."[24] Logically, the idea that protected interests arise directly under the Constitution was not applicable to the protection of property that would itself not exist without state law. Therefore, courts must look to these nonconstitutional sources to define property interests.

Then, as government programs developed to distribute wealth to citizens in the form of benefits, services, contracts, and licenses, these new types of property interests began to "tak[e] the place of traditional forms of . . . private property."[25] Therefore, to maintain property's function of securing individual independence and dignity, new doctrines developed to protect these new forms of property from arbitrary government action.

2. *Recognition of New Property: The State-Created Property Doctrine.* — As government benefits programs expanded, the Supreme Court determined that due process protections should also extend to these new forms of property. Consequently, the Court broadened its interpretation of constitutionally protected property from the rights attached to "core" traditional forms of property to a form of state-created "new property," which was defined by state statutes and regulations.[26] In *Goldberg v. Kelly*,

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22. Henry Paul Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 414 (1977).

23. Id. at 435–42 ("[T]he due process clause itself does not 'create' any property interests."); see also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–40 (1985) (holding plaintiffs "possessed property rights in continued employment" when, under Ohio law, they could only be terminated for cause because "[p]roperty interests are not created by the Constitution, 'they are . . . defined by existing rules or understandings that stem from an independent source such as state law'" (quoting *Roth*, 408 U.S. at 577)); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (finding due process protection attached to property right in welfare benefits because benefits "are a matter of statutory entitlement for persons qualified to receive them"); cf. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding statute prohibiting foreign language instruction deprived teachers and parents of liberty without due process of law because liberty includes "not merely freedom from bodily restraint but also the right . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"); Monaghan, supra note 22, at 413 (stating that definition of liberty in *Meyer* "assumes that the due process clause itself creates rights" and that these rights become "right[s] of constitutional, rather than state law, origin").

24. Monaghan, supra note 22, at 435.

25. Reich, New Property, supra note 20, at 733.

26. See, e.g., *Roth*, 408 U.S. at 577; *Goldberg*, 397 U.S. at 262; see also Reich, Individual Rights, supra note 2, at 1253–56 (discussing changes in society leading to need to recognize government entitlements as property rights). Reich espoused this theory of "new property" to recognize an individual's right to government-provided benefits. Reich, New

the Court first acknowledged "[m]uch of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."[27] The Court found that welfare benefits constituted a property interest protected by due process because "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them."[28] While *Goldberg* began to recognize this concept of "new property,"[29] created by state law and the provision of benefits, the Court left open the question of how to determine when these state-created interests amounted to a "statutory entitlement" requiring due process.[30] Therefore, two ways of reading *Goldberg* emerged.[31] One emphasized that the "importance of the interest determines" whether due process is required.[32] The other "focuse[d] on whether a reasonable expectation to continued receipt of the benefit existed."[33]

Property, supra note 20, at 785–86. The Court later used this theory to support judicial recognition of this right. See infra notes 27–29 and accompanying text (discussing first time Court recognized property interest in government-provided benefits).

27. 397 U.S. at 262 n.8.

28. Id. at 262. Finding that welfare benefits create a property right, the Court then addressed the second prong of the due process inquiry: what process is due. See supra note 18 and accompanying text (discussing two steps of any due process analysis). In doing so, the Court balanced the extent to which the individual may be "'condemned to suffer grievous loss,'" "the recipient's interest in avoiding that loss," and "the governmental interest in summary adjudication." *Goldberg*, 397 U.S. at 262–63 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). *Mathews v. Eldridge* later standardized the determination of what process is due by balancing three factors: the interests of the individual in retaining their property, the risk of error and value of additional procedures, and the interests of the government. 424 U.S. 319, 334–35 (1976).

29. In fact, the *Goldberg* Court directly cited Reich's work, which created and advocated for judicial recognition of "new property." *Goldberg*, 397 U.S. at 262 n.8; see also supra note 26 and accompanying text (providing introduction to Reich's "new property" theory).

30. See Erwin Chemerinsky, Procedural Due Process Claims, 16 Touro L. Rev. 871, 880 (2000) (noting Court did not prescribe method for determining whether property or liberty interest exists).

31. Id.

32. Id.; see also Blackwell Coll. of Bus. v. Att'y Gen., 454 F.2d 928, 932 (D.C. Cir. 1971) (stating that, under *Goldberg*, Blackwell was entitled to due process protection because its status as an approved school for attendance by nonimmigrant alien students was "a valuable asset . . . which the governmental proceedings threatened to terminate"); Crafton v. Luttrell, 378 F. Supp. 521, 527 (M.D. Tenn. 1973) (agreeing with "numerous lower federal courts" that *Goldberg* requires that "procedural safeguards apply to prison disciplinary hearings in which the punishment imposed represents a 'grievous loss' to the prisoner"); Keller v. Kate Maremount Found., 365 F. Supp. 798, 802 (N.D. Cal. 1972) (finding interest "worthy" of due process protection under *Goldberg* because rent increase in publicly-financed housing was "tantamount to eviction").

33. Chemerinsky, supra note 30, at 880; see also Lucas v. Chapman, 430 F.2d 945, 947 (5th Cir. 1970) (holding nontenured schoolteacher whose year-by-year contract, after eleven years, was not renewed had protective interest because "his long employment in a continuing relationship . . . was sufficient to give him the necessary expectancy of reemployment"); Davis v. Weir, 328 F. Supp. 317, 320–21 & n.11 (N.D. Ga. 1971) (noting

Returning to this question two years later in *Board of Regents v. Roth*, the Supreme Court endorsed the "reasonable expectation" interpretation of *Goldberg* and solidified the doctrine of state-created property.[34] In *Roth*, a professor on a year-to-year employment contract claimed a deprivation of both a property interest and a liberty interest when a state university did not renew his contract. Determining no property interest existed, the Court looked to the employment contract to hold that the individual could have no reasonable expectation for continued employment beyond each year.[35] The Court concluded that due process applies to protect an individual's right from being arbitrarily undermined only once state law has created a reasonable expectation that the property interest will be protected.[36] However, in determining no liberty interest existed, the Court looked not to the contract but to broad constitutional freedoms, such as the right to contract and work.[37] The Court concluded that not rehiring the plaintiff for "one year at one university" was not sufficient to invoke a "liberty" interest, because the university did not damage the plaintiff's reputation and the plaintiff retained the freedom to find other university employment.[38] *Roth* thereby created a fundamental distinction between liberty and property interests under the Due Process Clause that continues to apply to this day.[39]

Goldberg's emphasis on statutory entitlement and that "most of the cases applying the *Goldberg* rationale involved the termination of government rights, privileges or benefits to which the claimant was *directly entitled*").

34. 408 U.S. 564, 577 (1972).

35. Id. at 578 ("[T]he terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement . . . .").

36. Id. at 577.

37. Id. at 572. The Supreme Court has stated that the concept of "liberty" guaranteed by the Fourteenth Amendment implies freedom from unreasonable or arbitrary restraint. Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 157 (1931). The inclusion of the right to contract and work within the concept of liberty is therefore recognized as essential to the "right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will." Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). As the Court stated in *Roth*, "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." 408 U.S. at 572. And, while the Court has never attempted to "'define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment],'" the term

> "[w]ithout doubt, . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."

Id. at 572 (first, second, and last alterations in original) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

38. 408 U.S. at 575.

39. See id. at 572–78 (distinguishing between liberty and property interests by finding plaintiff did not have property interest in reemployment through his contract, nor did

B. *Due Process Protections for Inmates*

While distinct analyses for property and liberty for free society developed, courts continued to struggle to define the scope of protected rights in prisons. Within a prison's closed institution, certain limitations are inevitably necessary. For example, a prison sentence, imposed after a full criminal trial, greatly restricts a prisoner's liberty.[40] Likewise, the security concerns that arise in prisons legitimately necessitate some curtailments of prisoners' property interests.[41] However, the difficulty in distinguishing between permissible and impermissible deprivations has frustrated courts' attempts to develop a workable test for determining when a deprivation triggers due process.[42] This exercise in line-drawing renders procedural due process claims particularly important in the prison context, where a state's decision to deprive is "far more controversial than the nature of the punishment itself."[43]

In the prison context, courts quickly abandoned *Roth*'s distinct liberty and property analyses in favor of a uniform approach that looked to nonconstitutional law to evaluate all prisoners' due process claims.[44] De-

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he have liberty interest in it through broad constitutional freedoms); see also Michael Z. Goldman, *Sandin v. Conner* and Intraprison Confinement: Ten Years of Confusion and Harm in Prisoner Litigation, 45 B.C. L. Rev. 423, 431 (2004) (examining distinction created in *Roth* between liberty and property in context of due process claims).

40. See Weisman, supra note 8, at 905–06 (discussing courts that have looked to "permissible scope of the inmates' prison sentences" when analyzing prisoners' liberty interests). For example, in Vitek v. Jones, 445 U.S. 480 (1980), an inmate was involuntarily committed to a mental institution. The Court recognized that while for "an ordinary citizen to be subjected involuntarily [to a mental institution], it is undeniable that protected liberty interests would be unconstitutionally infringed[,] . . . a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement." Id. at 492–93. Therefore, in holding the inmate did have a liberty interest in his freedom from this involuntary confinement, the Court looked to whether "'the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him.'" Id. at 493 (quoting Montanye v. Haymes, 427 U.S. 236, 242 (1976)); see also Meachum v. Fano, 427 U.S. 215, 225 (1976) (stating liberty interest is not implicated when confinement is "within the normal limits or range of custody which the conviction has authorized the state to impose").

41. Property interests have always been more limited in prison than in general society. Property in prison can promote jealousies and can lead to fighting, gambling, and storage problems. Therefore, courts have generally allowed institutional limitations on personal property when a legitimate governmental purpose is served. See 2 Mushlin, supra note 13, § 9:43, at 404 (discussing reasons for legitimate limitations on prisoners' property rights).

42. Lee, supra note 18, at 791 (discussing "[j]udicial weariness" with prison litigation because of difficulty in determining "the margin of constitutional rights and liberty retained by prisoners").

43. Weisman, supra note 8, at 903.

44. See Herman, New Liberty, supra note 3, at 506–12 (describing evolution of state-created interest doctrine and erosion of distinct liberty and property rights analyses for prisoners).

spite the differences between the nature of property and liberty,[45] and the purpose of the "new property" approach to protect new forms of property such as government benefits,[46] courts decided to use the state-created interest doctrine as a convenient way to also define liberty within prison in light of the difficulties in determining the scope of liberty after incarceration. This section will discuss the decision by courts to merge the standards for property and liberty in the prison context, and the eventual adoption of a two-part test, in *Hewitt v. Helms*,[47] that courts thereafter applied to all prisoner due process claims. It will then discuss the criticisms of this uniform *Hewitt* approach, which eventually led the Supreme Court to adopt a new standard for prisoners' liberty interests in *Sandin v. Conner*.

1. *State-Created Liberty Doctrine: The* Hewitt *Test.* — As in *Roth*, courts originally looked to the Constitution to analyze a prisoner's liberty interest. For example, in *Morrissey v. Brewer*, the Supreme Court determined that due process was required when a convicted prisoner's parole was revoked without a hearing, reasoning that parole includes "many of the core values of unqualified liberty," including the ability to work and spend time with family.[48] Consistent with *Roth*, the Court did not examine statutes or regulations governing parole revocation, but instead found the liberty interest in remaining on parole to arise directly from the Constitution.[49]

However, difficulty in determining what exactly remained of an individual's liberty after conviction led courts to ultimately reject this approach and instead look to statutes and regulations to determine both liberty and property interests in prisons.[50] In 1974, the Supreme Court in *Wolff v. McDonnell* collapsed *Roth*'s separate analyses in the prison context.[51] In *Wolff*, the Court found that prisoners had a protected liberty

45. See supra Part I.A.1 (articulating rationale for separation of liberty and property analyses).

46. See supra Part I.A.2 (discussing development of "state-created property doctrine" in *Goldberg* and *Roth*).

47. 459 U.S. 460, 471–72 (1983).

48. 408 U.S. 471, 472–73, 482 (1972).

49. Id.; see also Barbara Belbot, Where Can a Prisoner Find a Liberty Interest These Days? The Pains of Imprisonment Escalate, 42 N.Y.L. Sch. L. Rev. 1, 13–14 (1998) (discussing *Morrissey*'s reliance on Fourteenth Amendment and avoidance of reference to state statutes or regulations).

50. Lee, supra note 18, at 791 ("Judicial weariness with prison litigation reflects in part the difficulty of distinguishing between the lawful deprivation of liberty represented by imprisonment, and the margin of constitutional rights and liberty retained by prisoners."); see also Goldman, supra note 39, at 431–33 (discussing transition from *Morrissey* to *Wolff*).

51. 418 U.S. 539, 557 (1974) ("This analysis as to liberty parallels the accepted . . . analysis as to property.").

interest in good-time credits[52] because while "the Constitution itself does not guarantee good-time credit . . . here the State itself has not only provided a statutory right . . . but also specifies that it is to be forfeited only for serious misbehavior."[53] Therefore, once the state created a statutory right to good-time credits, the Due Process Clause would "insure that the state-created right is not arbitrarily abrogated."[54] Thus, in an analytical move similar to that in *Roth*, the *Wolff* Court found that while the Due Process Clause protected the liberty interest, the interest itself did not arise directly from the Constitution but from the state's creation of a statutory right to good-time credits unless there is serious misbehavior.[55]

Development of this doctrine led to the Supreme Court's adoption, in *Hewitt v. Helms*, of a two-part test to determine when a statute or regulation creates a protected liberty or property interest in the prison context.[56] In *Hewitt*, a prisoner challenged his confinement in administrative segregation, claiming a violation of due process.[57] The Court held that

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52. Id. at 556–57. Good-time credits can shorten the time actually served on a sentence. Id. at 546 n.6.

53. Id. at 557.

54. Id.

55. See id. at 556–58 ("[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."); Belbot, supra note 49, at 14–16 (discussing *Wolff*'s treatment of the "relationship between the property interest doctrine and the liberty interest doctrine"); Goldman, supra note 39, at 433 ("[T]he court in *Wolff* did not analyze the plaintiff's liberty interest under the broad, amorphous standards seen in *Roth* and *Morrissey*. Instead the court noted that the right . . . was created pursuant to Nebraska state law." (footnotes omitted)). Courts applied this state-created interest doctrine in almost all prisoner due process claims for the next twenty years. See Goldman, supra note 39, at 423, 432 ("*Wolff v. McDonnell* . . . creat[ed] in its wake the 'state-created liberty interest doctrine,' which for the next twenty years would apply to the majority of [prisoner due process] cases."); see also Belbot, supra note 49, at 14–16, 55–56 (discussing *Wolff*'s adoption of state-created liberties doctrine and Supreme Court's continued adherence to this doctrine). But see Washington v. Harper, 494 U.S. 210, 218 (1990) (holding administering antipsychotic drugs without inmate's consent violated liberty interest arising directly from Due Process Clause, independent of state law); Vitek v. Jones, 445 U.S. 480, 487–88 (1980) (finding inmate had liberty interest in not being transferred to mental hospital originating from Due Process Clause itself).

56. 459 U.S. 460, 471–72 (1983); see infra note 60 and accompanying text (discussing *Hewitt* Court's adoption of two-part test for determining when prisoner has interest protected by due process).

57. *Hewitt*, 459 U.S. at 462. Following a prison riot, the prison officials confined the plaintiff, Helms, in administrative segregation pending an investigation into his role in the riot. Id. at 463–64. While Helms was given a misconduct report the next day, the original hearing committee made no finding of guilt due to insufficient information and ordered that Helms's confinement be continued. Id. at 464. A month later a review committee reviewed the status of Helms's confinement and recommended confinement be continued partly because the committee was "awaiting information regarding his role in the riot." Id. at 465. Several weeks later, a second misconduct report was given to Helms, charging him with assaulting a different officer. Another hearing committee was convened. After hearing testimony from one guard and Helms, this committee found Helms guilty and ordered

while Helms did not have a liberty interest arising from the Due Process Clause, Pennsylvania regulations that govern officials' authority to segregate prisoners did confer a protected interest to remain in the general population.[58] In its analysis of the regulations, the Court stated that to find a state-created interest, there must be more than "simple procedural guidelines."[59] A court must find (1) "unmistakably mandatory" language, and (2) the use of "specific substantive predicates."[60] Applying this test in *Hewitt*, the Court found that Pennsylvania regulations (1) required that certain procedures "shall," "will," or "must" be employed, and (2) specified that administrative segregation would not occur absent "the need for control," or "the threat of a serious disturbance."[61] Thus, a state-created liberty interest triggering due process protections existed in avoiding administrative segregation.[62] The use of this two-part determination became standard and was applied identically to the liberty and property interests of prisoners.[63]

The *Hewitt* analysis allowed courts to use statutes and regulations that sufficiently cabined officials' discretion to recognize a prisoner's procedural rights even when they were not directly protected by the

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that he be confined to disciplinary segregation for six months. Id. The committee also dropped the earlier charge without determining guilt. Id.

58. Id. at 467, 470–71.

59. Id. at 471.

60. Id. at 471–72.

61. Id.; see also id. at 470 n.6 (providing text of relevant Pennsylvania regulations). For example, § 95.104(b)(3) of Title 37 of the Pennsylvania Code provided that,

> An inmate may be temporarily confined to Close or Maximum Administrative Custody in an investigative status upon approval of the officer in charge of the institution where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or others. The inmate shall be notified in writing as soon as possible that he is under investigation and that he will receive a hearing if any disciplinary action is being considered after the investigation is completed. An investigation shall begin immediately to determine whether or not a behavior violation has occurred. If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated but in all cases within ten days.

Id. at 470 n.6 (quoting 37 Pa. Code § 95.104(b)(1) (1978)).

62. 459 U.S. at 471–72. While the Court did find that Helms had a liberty interest in confinement, it ultimately held that the procedures followed, including an informal nonadversary evidentiary review, were sufficient to satisfy the due process requirements for continued confinement. Id. at 477.

63. E.g., Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 463–64 (1989) (holding Kentucky regulations do have "'substantive predicates'" guiding prison officials' determination to allow visitation but "lack the requisite relevant mandatory language" to create liberty interest (quoting *Hewitt*, 459 U.S. at 472)); Abdullah v. Gunter, 949 F.2d 1032, 1038 (8th Cir. 1991) (finding no property interest in prisoner's use of Inmate Trust Fund account for religious donations because relevant statute's reference to religious organizations is too vague to be mandatory language); Lyon v. Farrier, 727 F.2d 766, 769 (8th Cir. 1984) (holding no liberty or property interest in prison employment or back pay because relevant regulation does not contain "'language of an unmistakably mandatory character'" (quoting *Hewitt*, 459 U.S. at 471)).

Constitution.[64] Courts applied the *Hewitt* test strictly to all prisoner due process claims, not looking at the weight or nature of the deprivation,[65] but only whether the statute had the "mandatory" language *Hewitt* required.[66] This approach ensured that once a state or federal statute or regulation gave an inmate a "reasonable expectation" of a property or liberty interest, prison officials could not arbitrarily revoke it.[67]

2. *Courts Pull Back: Criticisms of* Hewitt *Lead to* Sandin. — As courts applied *Hewitt* to liberty and property interests, commentators began to realize its potential to engender inconsistent results.[68] Looking only to statutory language, and ignoring completely the hardship imposed by a deprivation, courts increased the pure number of protected interests, yet failed to protect prisoners from serious deprivations when statutes did not possess the necessary "mandatory" language.[69] For example, in *Olim*

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64. Belbot, supra note 49, at 1–2, 60 ("*Wolff v. McDonnell* ended the often exercised, unfettered discretion of prison administrators to inflict punishment on inmates without any procedural due process."); Susan N. Herman, Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue, 77 Or. L. Rev. 1229, 1238, 1244 (1998) [hereinafter Herman, Slashing] ("[L]awful incarceration did not retract the right not to be arbitrarily punished.").

65. See, e.g., Meachum v. Fano, 427 U.S. 215, 224 (1976) (rejecting "at the outset the notion that *any* grievous loss . . . is sufficient to invoke the procedural protections of the Due Process Clause" and reaffirming that "the determining factor is the nature of the interest involved rather than its weight"); see also Herman, Slashing, supra note 64, at 1254–55 (discussing limits of courts' approach after *Wolff*).

66. See, e.g., Stephany v. Wagner, 835 F.2d 497, 500 (3d Cir. 1987) ("[T]he dispositive question in determining whether a state rule creates a protected liberty interest is whether it 'plac[es] substantive limitations on official discretion.'" (alteration in original) (quoting Olim v. Wakinekona, 461 U.S. 238, 249 (1983))).

67. Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government." (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889))).

68. See, e.g., Joseph P. Messina, *Kentucky Department of Corrections v. Thompson*: The Demise of Protected Liberty Interests Under the Due Process Clause, 17 New Eng. J. on Crim. & Civ. Confinement 233, 253 (1991) (stating under *Hewitt* analysis "some important interests may inadvertently remain unrecognized" while "[i]ronically, other liberty interests may mistakenly be created in somewhat less important areas"); Deborah R. Stagner, *Sandin v. Conner*: Redefining State Prisoners' Liberty Interest and Due Process Rights, 74 N.C. L. Rev. 1761, 1775 (1996) (discussing how "application of the *Hewitt* test in later cases resulted in 'anomalous' outcomes" (quoting Sandin v. Conner, 515 U.S. 472, 483 n.5 (1995))); Weisman, supra note 8, at 917 ("[The] most damaging consequence of the Court's former due process analysis was its theoretical inconsistency.").

69. See Goldman, supra note 39, at 433–34 (discussing how "[t]his reasoning both assisted and hurt prisoners"). Goldman illuminated,

> If prisoners could assert violations of a specific statute or regulation by prison officials, they would not be at the mercy of arbitrary deprivations of their freedoms, regardless of how large or small the freedom being violated. In contrast, if a specific right had not been created and outlined by the state, courts would rarely find a right to due process, regardless of how severe the punishment or unfair the treatment inflicted.

Id. at 434 (footnotes omitted).

v. Wakinekona, the Supreme Court looked to Hawaiian prison regulations to find no liberty interest in the transfer of an inmate from a Hawaiian prison to a Californian prison, even though it inflicted a "grievous" loss, separating him from his family by an ocean.[70] On the other hand, in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, the Court found that while there was no constitutional right to parole, the relevant statute's "unique structure and language," which included language such as "shall" and "unless," created a liberty interest in a parole release determination.[71] Since under this analysis courts did not consider the seriousness of the deprivation, the existence of constitutionally protected rights depended fully on whether statutes were written with sufficiently "mandatory" language.[72]

Prisoners' rights advocates criticized these inconsistencies under the *Hewitt* approach for leading to two undesirable results. First, prisoners remained unprotected from serious deprivations when statutes did not possess the necessary language to protect certain rights.[73] Second, legislatures possessed too much power to define prisoners' due process rights because *Hewitt* enabled lawmakers, by writing laws that granted sufficient discretion to prison officials, to avoid providing any due process protections for even grievous losses of freedom.[74] Therefore, the *Hewitt* approach often targeted situations in which providing due process protections was likely the least necessary. States that genuinely attempted to restrict the discretion of prison officials were subject to constitutional scrutiny, while the states with few statutory protections avoided this due process review.[75]

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70. 461 U.S. 238, 249 (1983) ("Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause.").

71. 442 U.S. 1, 7, 11–12 (1979).

72. Stagner, supra note 68, at 1775.

73. See, e.g., *Olim*, 461 U.S. at 247–48 ("Even when, as here, the transfer involves long distances and an ocean crossing, the confinement remains within constitutional limits. . . . '[T]he determining factor is the nature of the interest involved rather than its weight.'" (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976))); supra note 70 and accompanying text (discussing decision in *Olim*); see also Herman, Slashing, supra note 64, at 1255 (stating because *Hewitt* doctrine "declined to look at the nature of the interest," it "allowed the state to inflict grievous losses of freedom with no due process at all").

74. See Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, 93 Colum. L. Rev. 309, 328 (1993) (stating *Hewitt* standard could "allow the states to evade due process restraints by refusing to recognize that 'property' exists"); see also Chase, supra note 17, at 585 ("[I]f states delegate enough regulatory discretion . . . no protected interest will be found. . . . [This] understanding . . . allows legislatures too much power in defining the interests protected by due process.").

75. See Weisman, supra note 8, at 917–19 ("The message . . . was not subtle: take commendable steps to control the discretion of prison officials or reduce arbitrary discipline, and you will subject yourself to procedural due process claims in federal court.").

On the other hand, opponents of *Hewitt*'s expansion of prisoners' rights criticized the flood of litigation *Hewitt* created.[76] They argued that the *Hewitt* statute-focused analysis resulted in a burdensome rise in frivolous and meritless claims.[77] This concern also reflected an overall change in attitudes towards prisoners' rights.[78] Evidence of this change is found in the efforts of both Congress and the courts to curtail prisoner litigation.[79] Together, the change in attitude and criticism of *Hewitt* paved the way for the Court to reject *Hewitt* in *Sandin v. Conner*.

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76. See Goldman, supra note 39, at 435–36 (discussing "burdensome rise in prisoner litigation"). However, while the number of annual prisoner complaints alleging due process violations did dramatically increase between 1980 and 1996, so did the prison population, creating an actual decrease in filings per prisoner. Herman, Slashing, supra note 64, at 1294–95. Further, comparison of inmates' and noninmates' federal filing rates is misleading because many noninmates' grievances are litigated in state rather than federal court. Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1575–76 (2003) ("Even if inmates file as many cases in state court as they do in federal court (a very high estimate . . .), the total . . . inmate filing rate approximates the total noninmate filing rate." (footnote omitted)); see also infra note 117 and accompanying text (discussing proportionately small amount of federal docket time spent on prisoner petitions).

77. See Pierce, supra note 19, at 1979–80 ("A prisoner's protected 'liberty' interests [after *Wolff*] included anything that was governed by prison rules, potentially including access to a tray lunch rather than a box lunch."). In fact, in the "tray lunch" case to which Pierce refers, Burgin v. Nix, 899 F.2d 733 (8th Cir. 1990), the inmate did not complain about the form of lunch but about his "reclassification as an 'incorrigible inmate' without any notice or hearing" where one of the consequences was a change in lunch. Herman, Slashing, supra note 64, at 1256 n.125. This case is only one of many cases advertised as frivolous, when in fact it involved serious issues. Other popular and often-cited cases purporting to support the claim of too many "frivolous" suits involve a prisoner who sued because his prison had no salad bars on weekends or holidays; a prisoner who sued because his towels were white instead of beige; and an inmate that claimed cruel and unusual punishment from receiving creamy instead of chunky peanut butter. In fact, the "salad bar" case involved dangerously unhealthy prison conditions, including food contaminated by rodents and forced confinement of prisoners with contagious diseases; the "beige towel" case involved towels and a jacket sent to an inmate from his family that were confiscated as discipline for receiving the package; and the "peanut butter" case involved incorrect debiting to an inmate's prisoner account after he had been permitted to return a wrongly received item. Jon O. Newman, Pro Se Prisoner Litigation: Looking for Needles in Haystacks, 62 Brook. L. Rev. 519, 520–22 (1996).

78. Compare Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."), with Sandin v. Conner, 515 U.S. 472, 485 (1995) ("'[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights.'" (quoting Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977))).

79. In 1987, the Supreme Court decided Turner v. Safley, 482 U.S. 78, 89–91 (1987), which developed a reasonableness standard for prisoners' constitutional claims. Since *Turner*, to determine if a regulation that infringes on a prisoner's right is reasonable, the Court has used a four-factor test, which considers the connection between the regulation and valid government objectives, the alternatives for exercising the right, the effect of exercising the right on the institution, and the easy alternatives for prison officials. See 2 Mushlin, supra note 13, § 2:4 (discussing *Turner* Court's four-part test). A few years later, in Wilson v. Seiter, 501 U.S. 294 (1991), the Court set a new standard of deliberate indifference for prisoners claiming cruel and unusual punishment. It requires a showing that

C. *Everything Changes:* Sandin v. Conner *and Its Effect on Prisoner Due Process Rights*

In 1995, in *Sandin v. Conner*, the Supreme Court significantly curtailed the ability of prisoners to claim due process violations of liberty interests.[80] All members of the Court concluded change was necessary in response to the inconsistencies of the *Hewitt* approach. However, the Court was sharply divided, in a 5-4 decision, on what should change.[81] The majority abandoned *Hewitt* and adopted a completely new test that looks at the weight of the interest to determine whether the deprivation causes an "atypical and significant" hardship.[82] While Justice Ginsburg's dissent also recognized the inconsistencies that *Hewitt* created, she criticized the majority for setting the bar too high and not providing lower courts with guidance on the new test's application.[83] On the other hand, Justice Breyer's dissent supported the *Hewitt* standard, criticizing the majority for creating uncertainty and unnecessarily abandoning the former standard instead of simply providing clarifying guidance.[84] The dissenting Justices demonstrated not only the potential severity of *Sandin*'s im-

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prison officials had a culpable state of mind. Id. at 294, 299; see also Belbot, supra note 49, at 5 (discussing effects of *Wilson* on curtailment of prisoner litigation). In addition to judicial developments, in 1996, Congress passed the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to 1321-77 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.). The PLRA created new pleading and exhaustion requirements and limitations on the prospective relief that courts could grant that restricted prisoner access to federal courts. See Herman, Slashing, supra note 64, at 1275–89 ("[T]he PLRA deters and prevents individual prison litigation by imposing financial and other restrictions on prisoner-plaintiffs."). In the same year, Congress also passed the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.). The AEDPA substantially restricts the ability of state and federal prisoners to file for habeas corpus relief in federal court. See Schlanger, supra note 76, at 1632–33 (explaining AEDPA requires prisoners to file any petition for habeas review in first year following conviction and limits prisoners to one round of federal habeas review).

80. 515 U.S. 472. In the opinion of one scholar, "the Court's new approach may have the practical effect of eliminating state-created liberty interests entirely as a significant source of due process protection." Weisman, supra note 8, at 918–19; see also Belbot, supra note 49, at 55–62 (discussing *Sandin*'s impact on state-created liberty theory and stating "*Sandin* allows principles of prison management and administration to regress dangerously close to the time when officials operated their institutions outside the rule of law"); Goldman, supra note 39, at 425 ("[T]he results of the decision . . . have been disastrous for prisoners.").

81. 515 U.S. at 472. Chief Justice Rehnquist delivered the opinion of the Court joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Ginsburg filed a dissenting opinion joined by Justice Stevens. Justice Breyer filed a dissenting opinion joined by Justice Souter. Id. at 473.

82. Id. at 472.

83. See infra notes 108–112 and accompanying text (discussing Justice Ginsburg's dissent).

84. See infra notes 113–119 and accompanying text (discussing Justice Breyer's dissent).

pact on prisoners' due process claims but also accurately predicted the immense difficulty lower courts would have with applying *Sandin*'s standard. Their discussion of the appropriate contours of constitutionally protected liberty and property interests sheds light on the appropriate scope of *Sandin* beyond the exact circumstances of that case. In *Sandin*'s aftermath, this guidance proves indispensable, as lower courts continue to struggle to apply its vague and uncertain standard in a variety of circumstances and to determine what is left, if anything, of the *Hewitt* methodology.

The following sections provide an analysis of this decision and its aftermath. Part I.C.1 provides the background for the case. Part I.C.2 discusses the majority opinion, and Part I.C.3 discusses the dissenting opinions. Finally, Part I.C.4 discusses developments since *Sandin*, including the ensuing uncertainty in lower courts regarding how to apply the new standard.

1. *The Case of* Sandin v. Conner. — In *Sandin v. Conner*, the plaintiff Conner, an inmate at the Halawa Correctional Facility in Hawaii, alleged that prison officials improperly subjected him to disciplinary segregation.[85] After an abusive verbal confrontation between Conner and a corrections officer, the prison's Adjustment Committee held a hearing and found Conner guilty of "high misconduct," involving "physical interference to impair a correctional function."[86] The Committee sentenced him to thirty days of disciplinary segregation.[87] Nine months later, after Conner served the thirty-day sentence, the Deputy Administrator granted his appeal, reversed the high misconduct finding as unsupported by the evidence, and expunged his record.[88]

While his administrative appeal was pending, Conner filed suit in federal court.[89] The district court granted the defendants' summary judgment motion, but the Ninth Circuit reversed.[90] The Ninth Circuit concluded that state regulations created a liberty interest because they limited official discretion to impose disciplinary segregation to only when

85. 515 U.S. at 472.

86. Id. at 475.

87. Id. Conner was also found guilty of "'low moderate misconduct' for using abusive or obscene language and for harassing employees" and sentenced to four hours' segregation for each charge to be served concurrently with the thirty days. Id. at 475–76. Disciplinary segregation, similar to both administrative and protective custody, id. at 486, involved twenty-three hours a day spent alone in a cell, with fifty minutes a day allowed for exercise or showering, while still alone and in leg and waist chains. Id. at 494 (Breyer, J., dissenting). By contrast, in the general population inmates could work, participate in educational programs, leave their cells, and interact with other prisoners for eight hours a day. Id.

88. Id. at 476.

89. Id.

90. Id.

"substantial evidence" of guilt existed.[91] However, in a 5-4 decision, the Supreme Court reversed.

2. *Majority Decision.* — A sharply divided Supreme Court concluded that federal courts should abandon the *Hewitt* approach for analyzing liberty interests because its sole focus on parsing state law overemphasized distinguishing "mandatory" and "discretionary" language.[92] Instead, courts should focus on the "nature" of the deprivation.[93] Essentially ending the application of the state-created liberty interest doctrine,[94] the Court articulated a new standard to limit protected liberty interests "generally . . . to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[95]

The Court cited several pragmatic reasons for adopting the new standard. First, the *Hewitt* standard encouraged prisoners to "comb regulations in search of mandatory language" that might give minor claims constitutional protection.[96] The Court stated that this not only led to frivolous lawsuits and misuse of judicial resources, but it also misunderstood the purpose of prison rules, which were meant to guide prison officials, not confer rights on prisoners.[97] Second, the focus on mandatory language created disincentives for states to codify prison regulations for fear of creating liberty interests.[98] Lastly, *Hewitt*'s state-created liberty doctrine brought courts too deep into the day-to-day affairs of prison management.[99] Instead, the Court reasoned, deference should be given to states and prison officials because of their expertise and the need for flexibility to ensure safety and security.[100]

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91. Id. at 476–77 (stating that Court of Appeals concluded from language of regulation that requirement to find "substantial evidence" was nondiscretionary, and thus state-created liberty interest existed).

92. Id. at 481, 483–84 & n.5 (majority opinion).

93. Id. at 472–74.

94. See supra note 80 and accompanying text (discussing effect of *Sandin* on state-created liberty interest doctrine). The *Sandin* Court stated that it would like to return to *Wolff* and *Meachum*, which recognized that states may under certain circumstances create liberty interests protected by the Due Process Clause. 515 U.S. at 483–84. In doing so, the Court recognized that state law may create a protected liberty interest that does not "give rise to protection by the Due Process Clause of its own force." Id. However, the Court limited state-created liberty interests to "freedom from restraint which . . . imposes atypical and significant hardship." Id. at 484. Since most (if not all) of the interests that meet this high standard also implicate liberty interests directly arising from the Due Process Clause, it is unlikely that any state-created interests will remain protected. See Weisman, supra note 8, at 922–24 ("[*Sandin*'s] new standard may well result in the elimination of state-created interests altogether.").

95. 515 U.S. at 484.

96. Id. at 473.

97. Id. at 481–82.

98. Id. at 482.

99. Id.

100. Id. at 482–83.

Applying this new test, the Court concluded that Conner did not have a liberty interest in avoiding disciplinary segregation.[101] The Court looked to the fact that disciplinary segregation was substantially similar to nonpunitive administrative and protective custody.[102] It also considered that the State expunged Conner's disciplinary record, relieving the negative repercussions of disciplinary measures.[103] Similarly, the Court found significant the fact that Conner's situation did not "inevitably affect the duration of his sentence."[104] Considering each of these factors, the Court concluded that disciplinary segregation did not mark a dramatic departure from the conditions of Conner's lawful incarceration. Therefore, the transfer did not require any due process because it did not present an atypical and significant hardship in relation to ordinary prison life.[105]

3. *The Dissenting Opinions.* — Four Justices dissented in two separate opinions: Justice Ginsburg joined by Justice Stevens,[106] and Justice Breyer joined by Justice Souter.[107] Like the majority, Justice Ginsburg's dissent also criticized the state-created liberty doctrine's perverse incentives for deregulation[108] and called for recognition of liberty interests arising directly under the Constitution.[109] However, Justice Ginsburg criticized the majority for the severity of its approach and for not providing guidance to determine what constitutes an "atypical, significant deprivation."[110] In Conner's case, she viewed disciplinary segregation as giving rise to a liberty interest directly under the Constitution because it "effected a severe alteration in the conditions of his incarceration."[111] She noted, however, that while Conner had a protected interest, his claim would likely fail because he received sufficient process.[112]

In Justice Breyer's view, Conner had a protected liberty interest arising directly from the Due Process Clause *and* from the prison's disciplinary rules.[113] He criticized the majority for unnecessarily abandoning

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101. Id. at 486.

102. Id.

103. Id. This included deprivation of privileges for protected periods, stigmatization, and diminishment of parole prospects. Id. at 489 (Ginsburg, J., dissenting).

104. Id. at 487 (majority opinion).

105. Id. at 486–87.

106. Id. at 488 (Ginsburg, J., dissenting).

107. Id. at 491 (Breyer, J., dissenting).

108. Id. at 490 (Ginsburg, J., dissenting).

109. Id. at 489; see also Christopher E. Smith, The Changing Supreme Court and Prisoners' Rights, 44 Ind. L. Rev. 853, 874 (2011) (discussing Ginsburg's "use[] [of] broad language about the liberty interests retained by prisoners" in her dissent in *Sandin*).

110. 515 U.S. at 490 n.2 (Ginsburg, J., dissenting).

111. Id. at 488.

112. Id. at 491.

113. Id. at 494 (Breyer, J., dissenting). Justice Breyer found a liberty interest arising directly under the Due Process Clause because the punishment "worked a fairly major change in Conner's conditions." Id. Justice Breyer also stated that even if this was not so,

pre-*Sandin* doctrine and for crafting an uncertain standard.[114] He stated that the preexisting liberty-defining standard, which looked to local law, provided a useful framework to examine deprivations that were neither serious enough to invoke the Due Process Clause directly nor obviously frivolous.[115] In defending the state-created liberty interest doctrine, Justice Breyer challenged criticisms of *Hewitt*. He stated that when local legislatures choose to cabin discretion, the decision suggests that procedural protections in the matter have proven useful and that the decisions involved are likely not judgmental matters that call for deference to prison officials.[116] Justice Breyer also did not believe *Hewitt* encouraged trivial claims, reasoning that the judiciary could easily distinguish between significant and insignificant deprivations.[117] Further, the Court could have alleviated its concerns more simply by providing guidance to clarify *Hewitt*'s reach.[118] Finally, similar to Justice Ginsburg, Justice Breyer concluded that while Conner had a protected interest, the record indicated that he received sufficient process.[119]

Sandin, aimed at addressing the problems associated with *Hewitt*, marked a dramatic departure from previous prisoner due process jurisprudence. The Court created a standard that no longer looked only to statutes and regulations to define liberty but also focused its inquiry on whether the deprivation created an "atypical and significant" hardship. While many felt a change from *Hewitt* was necessary, the majority left many questions unanswered, including the scope of *Sandin*'s application. By articulating existing views on the constitutional protections for liberty and property, the dissenting Justices help to give some ideas on the applicability of *Sandin* beyond the circumstances facing Conner. However, there is still uncertainty over whether the *Sandin* standard changed the analysis for all prisoner due process claims or only for prisoner liberty interests similar to Conner's.

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prison regulations create a liberty interest because they "severely cabin the authority of prison officials to impose this kind of punishment." Id.

114. Id. at 496. Justice Breyer specifically worried that courts may not know whether to read the majority opinion "as offering significantly less protection" or as "an extension of protection to certain 'atypical' hardships that pre-existing law would not have covered." Id.

115. Id. at 497.

116. Id. at 499.

117. Id. at 500. In fact, while the number of prison cases may be large, prison cases do not consume nearly a proportionate share of the federal courts' time. Since prisoner petitions rarely go to trial or even to hearings, and are generally screened and summarily dismissed at early stages of proceedings, "[t]he authors of several empirical studies have concluded that it is misleading to speak of prisoner . . . petitions as burdening the . . . courts." Herman, Slashing, supra note 64, at 1295 (discussing exaggerated and unfounded nature of claims that prisoner litigation is overwhelming courts). This reality suggests that courts can easily distinguish between meritorious and frivolous complaints. See also supra notes 76–77.

118. 515 U.S. at 496–97 (Breyer, J., dissenting).

119. Id. at 503–04.

4. *Uncertainty over* Sandin*: Development of the "Atypical and Significant" Standard.* — While the uncertainty of the *Sandin* standard was apparent from its creation,[120] subsequent developments in federal courts have helped shed light on how courts should apply *Sandin*'s amorphous standard outside of Conner's specific circumstances. However, as the Supreme Court has only returned to *Sandin* in a handful of cases,[121] uncertainty over *Sandin* continues to exist in two major categories: (1) the substantive definition of "atypical and significant"; and (2) the scope of *Sandin*, specifically whether *Sandin* also implicated due process claims

120. From the adoption of the standard in *Sandin*, the dissenting Justices recognized the new standard's vagueness was a flaw. See supra Part I.C.3; infra Part I.C.4 (discussing uncertainty in lower courts over ambiguities of *Sandin* standard). The diversity of commentators' initial reactions to the decision exemplified this uncertainty. While some commentators hoped the decision would support prisoner rights by resolving the problems of *Hewitt* and expanding prisoner rights beyond those created by state law, others criticized the Court for dramatically limiting prisoners' due process claims. Compare Chase, supra note 17, at 592–95 (discussing possibility *Sandin* signals movement away from "narrow focus of the entitlement test"), and Lee, supra note 18, at 788 n.15 ("[*Sandin*'s] movement away from dependence on state law could . . . allow[] for the existence of a liberty interest where a deprivation is atypical and significant despite the absence of state law protections."), with Belbot, supra note 49, at 3–4 (stating *Sandin* "turned back the clock on the prisoners' rights revolution" by "rescind[ing] rights that many lower federal courts . . . believed the Court had recognized since . . . 1974"), and Goldman, supra note 39, at 453–54 (describing effect of *Sandin* in transforming "codified rights" mandated by prison regulations "into mere 'guidelines for official conduct,' which prison officials could choose to ignore with little consequence" (quoting Belbot, supra note 49, at 6)). The Court has also been criticized for relying on prison regulations governing disciplinary segregation to conclude that the deprivation at issue in *Sandin* was not "atypical and significant," without inquiring into actual conditions, such as the number of prisoners in segregation or the frequency with which segregation is used. See Belbot, supra note 49, at 59–60, 69 ("Unfortunately . . . the Court's perspective of what constitutes atypical or significant hardships is based, at best, on an uninformed and naive understanding of prison life . . . ."); see also Lee, supra note 18, at 818, 845–46 (discussing cases applying *Sandin* in which courts failed to consider that "actual conditions . . . were more onerous than depicted in the regulations").

121. Eight Supreme Court cases have cited *Sandin*. Two did not involve prisons and only cited *Sandin* in passing. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (regarding searches and seizures of drugs in schools); Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (involving government obligation to enforce restraining order). Two involved prison rights, but not procedural due process, and only briefly cited *Sandin*. Overton v. Bazzetta, 539 U.S. 126 (2003) (involving prisoner's First Amendment, Eighth Amendment, and equal protection rights); Lewis v. Casey, 518 U.S. 343 (1996) (involving prisoners' right to access courts). Young v. Harper, 520 U.S. 143 (1997), briefly cited *Sandin* and discussed *Morrissey* at length in holding that a pre-parole program implicated a liberty interest, suggesting a distinction exists between in-custody and out-of-custody cases. See infra notes 130–133 and accompanying text (discussing courts' differing treatment for in-custody and out-of-custody cases). Three other cases discussed *Sandin* at some length. Wilkinson v. Austin, 545 U.S. 209 (2005) (stating inmate's assignment to supermax prison raises liberty interest); McKune v. Lile, 536 U.S. 24 (2002) (involving inmate's Fifth Amendment protection against self-incrimination); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998) (holding Ohio's clemency procedures do not impose "atypical and significant hardship").

involving property. While Parts II and III of this Note will focus on the circuit split over the latter question, to analyze how far *Sandin* should extend, it is first important to know what criteria the Court has used to determine whether a situation is "atypical" and "significant." Therefore, this section will discuss developments after *Sandin* concerning the substantive application of the "atypical and significant" test before this Note turns to the circuit split at issue.

Courts have struggled to substantively define when a deprivation should be considered "atypical" and "significant."[122] While the standard still remains considerably amorphous, the most recent Supreme Court case involving prisoners to invoke *Sandin*, *Wilkinson v. Austin*, gives some guiding principles on defining a liberty interest.[123] In *Wilkinson*, the Supreme Court found a liberty interest in avoiding placement in a supermax prison facility.[124] Discussing the contours of a prisoner's liberty, the Court stated, "Prisoners . . . have their liberty curtailed by definition."[125] Since *Sandin* redirected the analysis of liberty interests from the language of regulations to the nature of the conditions themselves,[126] the Court analyzed the specific conditions within the supermax facility, including its total solitary confinement, indefinite duration, and consequent disqualification from parole consideration.[127] Concluding that these factors together created an "atypical and significant hardship,"[128] the Court appeared to emphasize intense physical isolation and lack of potential freedom from the institution.

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122. Chemerinsky, supra note 30, at 885 (discussing "enormous amount of confusion in the lower courts" concerning *Sandin* test); see also Maximilienne Bishop, Supermax Prisons: Increasing Security or Permitting Persecution?, 47 Ariz. L. Rev. 461, 475–78 (2005) (discussing various tests lower courts use to determine when "atypical and significant" hardship exists); Lee, supra note 18, at 785 ("The [*Sandin*] Court held that the challenged action must impose an 'atypical and significant' hardship, but provided little guidance on how to measure typicality and significance."); Mark Adam Merolli, Comment, *Sandin v. Conner*'s "Atypical and Significant Hardship" Signals the Demise of State-Created Liberty Interests for Prisoners, 15 St. Louis U. Pub. L. Rev. 93, 118 (1995) ("*Sandin* is devoid of any guidance on what constitutes those 'atypical and significant' deprivations . . . .").

123. 545 U.S. 209. However, the Court declined to identify a baseline for "atypical and significant," stating that while "the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant," it was unnecessary to resolve the issue because the supermax facility in *Wilkinson* created "atypical and significant hardship under any plausible baseline." Id. at 223. See generally Lee, supra note 18 (discussing various standards adopted by Courts of Appeals in applying "atypical and significant" test and suggesting new approach for examining "typicality").

124. 545 U.S. at 223–24.

125. Id. at 225.

126. Id. at 223.

127. Id. at 223–24.

128. Id.

This focus is further bolstered by a trend that has developed in federal courts to recognize "atypical and significant" hardship more easily in cases involving an individual's freedom from the institution[129] (for example, pre-parole,[130] work release,[131] and good-time credits[132]) than in those involving deprivation within prison (for example, disciplinary or administrative segregation[133]). This trend suggests that courts interpret *Sandin* to recognize a liberty interest when restrictions on freedom go beyond those directly imposed by a prisoner's sentence or that are necessary for a prisoner's incarceration. On the other hand, a court will rarely find a liberty interest when classifications and deprivations relate directly to maintaining the safety and orderly administration of the prison. While courts have continued to interpret *Sandin*'s uncertainty in numerous ways, generally, courts have adopted a restrictive approach, making it substantially harder for prisoners to claim a deprivation of liberty.[134]

In determining the intended scope of *Sandin* and its application to prisoners' property interest claims, courts have weighed *Sandin*'s dual purposes—to limit frivolous claims and to give prison officials appropriate deference—against the subsequent interpretations of *Sandin* that emphasize physical freedom. Predictably, circuits have split as to whether *Sandin* addresses only liberty interests or whether the Supreme Court disavowed the *Hewitt* methodology in its entirety, thereby extending *Sandin* to property as well as liberty.

II. DISAGREEMENT OVER THE SCOPE OF *SANDIN*

Lower courts continue to struggle to define the scope of *Sandin*'s "atypical and significant" test. While the Court in *Sandin* relied heavily on

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129. Chemerinsky, supra note 30, at 885–88.

130. See, e.g., Young v. Harper, 520 U.S. 143, 147–48 (1997) (holding individual had liberty interest in pre-parole release program motivated by overcrowding because it allowed him to live on his own, get a job, and "live[] a life generally free of the incidents of imprisonment").

131. See, e.g., Kim v. Hurston, 182 F.3d 113, 118 (2d Cir. 1999) (holding revocation of work release program implicated protected liberty interest).

132. See, e.g., McGuinness v. Dubois, 75 F.3d 794, 795–98 & n.3 (1st Cir. 1996) (per curiam) (holding inmate had liberty interest in 100 days of good-time credit). But see Edwards v. Goord, 362 Fed. App'x 195, 197–98 (2d. Cir. 2010) (finding no liberty interest in good-time credits because they were discretionary award).

133. See, e.g., Pichardo v. Kinker, 73 F.3d 612, 612 (5th Cir. 1996) (holding "absent extraordinary circumstances, administrative segregation . . . will never be a ground for a constitutional claim"); Bonner v. Parke, 918 F. Supp. 1264, 1270 (N.D. Ind. 1996) (holding placement of inmate in disciplinary segregation for three years did not "create an atypical and significant hardship").

134. Goldman, supra note 39, at 455 (discussing how confusion has led many courts to utilize principle of deference to prison officials discussed in *Sandin* to reject claims without looking into reasons behind them); see also Pierce, supra note 19, at 1989 (stating *Sandin* had "predictable effect of transforming most prisoners' rights cases into easy summary victories for the government").

prudential rationales that may apply to all prisoner rights, its analysis focused specifically on defining liberty.[135] As a result, courts now disagree over whether *Sandin* affects the analysis of prisoners' property interests, or just those involving liberty. Many circuits have continued to apply *Hewitt* to property.[136] However, the Tenth Circuit has extended *Sandin* to all prisoners' due process claims.[137]

This Part discusses the circuits' interpretations of prisoners' property interests in light of *Sandin*. It first presents the majority approach, which continues to apply *Hewitt* to look to state statutes and regulations to define prisoners' property interests, and discusses concerns that have arisen with its application. It then discusses the approach of the circuits that support extending *Sandin*'s "atypical and significant" test for liberty to prisoners' property interests, their reasons for doing so, and the effect of this new analysis on prisoners' property rights.

A. *Majority Approach: Rejecting* Sandin

Most circuits agree that *Sandin* did not discuss property interests and therefore it should not alter the due process analysis for prisoners' property rights. Instead, these circuits continue to apply the analysis for property espoused in *Hewitt*, which looks to mandatory language in independent sources of law.[138] These circuits read *Sandin* narrowly, asserting that it concerned only a liberty interest and did not address the proper treatment of property.

1. *Overview of Majority Approach.* — The Fifth, Second, and Third Circuits explicitly reject extending *Sandin*. These circuits continue to look to mandatory language in statutes and regulations when determining whether a property right exists.[139] Thus, in these cases, the language in the relevant statutes and regulations has remained determinative in deciding if there is a protected interest.

a. *Fifth Circuit.* — The Fifth Circuit was the first to clearly address *Sandin*'s application to prisoners' property interests. In *Bulger v. United States Bureau of Prisons*, the Fifth Circuit used separate analyses for liberty and property to determine that an inmate, Bulger, had no constitutionally protected interest in prison employment.[140] Bulger alleged due process violations when prison officials terminated him from a work assignment in a manner that had not followed mandated federal prison proce-

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135. See supra Part I.C.2 (discussing majority decision in *Sandin*).

136. See infra Part II.A (discussing approach of circuits that continue to apply *Hewitt* to property).

137. See infra Part II.B (discussing approach of circuits that apply *Sandin* to property).

138. See supra notes 56–63 and accompanying text (discussing *Hewitt* approach).

139. See infra Part II.A.1.a–.b (discussing approach of Fifth, Second, and Third Circuits).

140. 65 F.3d 48 (5th Cir. 1995).

dures.[141] The termination also affected Bulger's ability to accrue good-time credits, which could have shortened his sentence.[142] Despite the prison officials' violation of mandatory procedures and the effect of the termination on Bulger's good-time credits, the court found no liberty interest. Applying *Sandin*, the court determined that no liberty interest existed because the termination did not create an atypical and significant hardship.[143] However, the court stated that *Sandin* "did not instruct on the correct methodology for determining when prison regulations create a protected property interest."[144] Relying instead on "well established" law, which looks to nonconstitutional sources, the court held that no property interest existed because the regulation on employment was solely procedural, placing no substantive restrictions on officials.[145] While *Bulger* was the first opinion on this issue, other circuits soon joined the Fifth and strengthened the rationale behind the decision.

b. *Second and Third Circuits.* — The Second and Third Circuits have followed the Fifth Circuit's lead. In *Handberry v. Thompson*, the Second Circuit first acknowledged the issue of whether *Sandin* affects the analysis of prisoners' property rights.[146] In *Handberry*, inmates relied on New York education laws, which entitled minors to a public education, to allege a deprivation of a property interest because the prison did not offer educational programs for incarcerated minors.[147] In determining which standard to apply to property interests, the court recognized that the Supreme Court in *Sandin* cautioned against relying on statutes and regulations.[148] However, the circuit concluded that "*Sandin* was concerned with the proper definition of *liberty* interests, not property interests."[149] Therefore, the court continued to employ the *Hewitt* standard for property that considered whether "the relevant statutes and regulations 'meaningfully channel[] official discretion by mandating a defined administrative outcome.'"[150] Applying this test, the court found no property interest in educational services because the regulations state only that incarcerated youths are "*eligible*" for educational services, while free minors are "*entitled*

141. Id. at 49.

142. Id. at 50 & n.2.

143. Id. at 50. The court supported this conclusion by stating that the loss of the ability to automatically accrue good-time credits did not "'inevitably affect the duration of [Bulger's] sentence.'" Id. (citing Sandin v. Conner, 515 U.S. 472, 487 (1995)).

144. Id.

145. Id.

146. 446 F.3d 335 (2d Cir. 2006).

147. Id. at 339.

148. Id. at 353 n.6.

149. Id.

150. Id. at 353 (alteration in original) (quoting Sealed v. Sealed, 332 F.3d 51, 56 (2d Cir. 2003)).

to attend public schools."[151] This analysis, which parsed individual words of the statute, demonstrates a clear decision to continue to apply *Hewitt*.

Similarly, in *Burns v. Pennsylvania Department of Corrections*, the Third Circuit even rejected the assertion by the dissent that the property analysis should be *informed* by the concerns articulated in *Sandin*.[152] In this case, Burns allegedly assaulted a fellow inmate.[153] The Pennsylvania Department of Corrections ordered him to 180 days of disciplinary custody and assessed his inmate account for medical expenses related to the fellow inmate's condition.[154] Burns sued, alleging only a property interest in the security of his inmate account.[155] Holding that a property interest existed in the account, the Third Circuit chose to not look to the *Sandin* decision or the concerns it expressed. It stated only that property rights are "'created and their dimensions are defined by existing rules or understandings that stem from an independent source'" of law.[156]

While the Second and Third Circuits explicitly stated they will not apply *Sandin* to property, three other circuits have also shown support by demonstrating an inclination towards this position without clearly accepting it.

2. *Support in the Sixth, Eighth, and Ninth Circuits.* — The Sixth, Eighth, and Ninth Circuits have not explicitly rejected the application of *Sandin* to property interests. However, cases in each of these circuits suggest support for the majority approach. While the doctrine in these circuits is less clear, the cases illuminate reasons for limiting *Sandin* to liberty.

a. *Sixth Circuit.* — The Sixth Circuit, in *Woodard v. Ohio Adult Parole Authority*, held that a death-row inmate did not have a life or liberty interest in clemency proceedings, and thus, Ohio's clemency procedures did not need to comport with due process.[157] While the case only dealt with life and liberty interests, the court showed clear support for keeping the property and liberty analyses separate.[158] The court first stated that "the

151. Id. at 353–54 (quoting N.Y. Educ. Law § 3202 (McKinney 2003)) .

152. 544 F.3d 279, 290 & n.8 (3d Cir. 2008). See infra notes 184–188 and accompanying text (discussing *Burns* dissent).

153. 544 F.3d at 281.

154. Id. at 283.

155. Id. at 285. Disciplinary custody is not discussed because Burns did not allege any liberty violation. Id.

156. Id. at 286 (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

157. 107 F.3d 1178, 1184 (6th Cir. 1997). In *Woodard*, the inmate's execution date was stayed so that he could pursue state post-conviction relief. Id. at 1181. However, because the execution was not stayed forty-five days in advance, the Ohio Adult Parole Authority (APA) initiated the clemency process, notifying the inmate's counsel that the clemency hearing would occur in ten days, and the pre-hearing interview, if desired, would occur in three days. Id. at 1181–82. Counsel objected to the short notice and sought assurances that they would be permitted to attend and participate in the interview and hearing. When the APA did not respond, Woodard filed an action challenging the procedures. Id. at 1182.

158. Id. at 1182–83.

Supreme Court has made it clear that both state law and the Due Process Clause itself may create [a liberty] interest," while "according to prevailing doctrine, state law controls as to the existence of a property interest."[159] Then, the court concluded that the inmate's "'original' liberty interest—that is, the one he possessed before he was arrested, charged, and convicted for his crime—has already been . . . afforded due process" through trial, appeal, and post-conviction processes.[160] Thus, applying the *Sandin* standard, the court held that a liberty interest in clemency proceedings did not exist because "a change in a prisoner's expectations regarding the likelihood of being granted clemency" cannot be deemed an "'atypical and significant hardship.'"[161]

However, in a subsequent case, *Pickelhaupt v. Jackson*, the circuit explicitly declined to decide the issue, stating "we need not decide today whether *Sandin* applies to protected property interests."[162] In *Pickelhaupt*, an inmate alleged a deprivation of a property interest when prison officials decreased his daily wage rate without notice or hearing.[163] The court found the prison officials had qualified immunity because the plaintiff had failed to demonstrate the necessary "clearly established" right.[164] This failure was due in part to the plaintiff's reliance on a pre-*Sandin* decision, which had held that nonconstitutional law can create a protected property interest in prison employment,[165] because *Sandin* had cast doubt on its validity.[166] Stating "the Supreme Court's 1995 *Sandin* decision casts

159. Id.

160. Id. at 1183.

161. Id. at 1185–86 (quoting Sandin v. Conner, 515 U.S. 472, 484 (1995)) (explaining prisoner's expectation regarding clemency "is not 'qualitatively different from the punishment characteristically suffered by a person convicted of crime'" (quoting Vitek v. Jones, 445 U.S. 480, 493 (1980))).

162. 364 F. App'x 221, 226 (6th Cir. 2010).

163. Id. at 222, 224. The issue over wage rate arose when prison officials decreased Pickelhaupt's daily wage rate by almost half without any notice or hearing. Id. at 222. In April 2001, Pickelhaupt accepted a prison position performing physical plant maintenance. The Classification Director at that time concluded that Pickelhaupt should receive the third level of licensed pay scale because he had a state-certified mechanics license, a certificate of completion in auto mechanics from a local community college, and over one thousand hours of training. However, four years later, a new Classification Director determined that Pickelhaupt was not using his license to perform his prison duties and reduced his rate accordingly, without notice or a hearing. Id.

164. Id. at 226. The defense of qualified immunity can be raised by officials sued in their personal capacity for damages. However, the defense fails if an official violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Hope v. Pelzer, 536 U.S. 730, 739 (2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); see also Lynn S. Branham, The Law and Policy of Sentencing and Corrections 391–92 (7th ed. 2005) (describing qualified immunity defense, its application, and its exceptions).

165. The plaintiff had relied on Newsom v. Norris, 888 F.2d 371, 374 (6th Cir. 1989).

166. 364 F. App'x at 226 (stating Pickelhaupt's reliance on the protected property interest recognized in *Newsom* was "unavailing" because "*Sandin* cast doubt on the validity of that decision").

doubt on *Hewitt*-type property interests," the circuit appears to have swung the other way, allowing *Sandin* to influence the analysis of property.[167]

In light of *Woodard* and *Pickelhaupt*, it is difficult to determine the current state of Sixth Circuit law. While the court explicitly declined to decide the issue, the decision to keep the analyses of property and liberty separate, even if allowing *Sandin* to influence property, seems to show support for limiting *Sandin*'s "atypical and significant" test.

b. *Eighth Circuit.* — The Eighth Circuit has decided several cases implicating prisoners' property interests. Instead of explicitly taking a position on the circuit split, the circuit has simply assumed the continued validity of the *Hewitt* analysis, which looks to independent sources of law to evaluate these claims, without mentioning the *Sandin* decision.

Immediately following *Sandin*, the Eighth Circuit cited the *Hewitt* test in *Jennings v. Lombardi* and looked to Missouri prison regulations to hold that a prisoner had no right to wages from prison employment.[168] In *Jennings*, a Missouri inmate incarcerated in Arkansas claimed that Missouri prison officials violated his Fourteenth Amendment rights by withholding prison wages for work he performed in Arkansas.[169] The court concluded, however, that since the law gave prisons "unfettered discretion" to establish terms for payment of wages based on available funds and value of work to the institution, the law was too discretionary to create a property interest.[170] In a subsequent case, *Mahers v. Halford*, the Eighth Circuit demonstrated further support for this approach.[171] At issue in *Mahers* was a prison procedure that automatically applied twenty percent of all money earned or received to court-ordered restitution payments despite a policy that exempted "money given to an inmate for use for a specific purpose, such as medical costs."[172] The court found that prisoners had a property interest in money received from outside sources by citing a previous Eighth Circuit opinion, *Sell v. Parratt*,[173] a pre-*Sandin* case in which the court looked to specific state law to find this property interest.[174] The court's reliance on *Sell*, despite the fact that it was de-

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167. Id. at 226.

168. 70 F.3d 994, 995–96 (8th Cir. 1995); see supra notes 56–63 (discussing two-part *Hewitt* test).

169. 70 F.3d at 995.

170. Id. at 996.

171. 76 F.3d 951 (8th Cir. 1996).

172. Id. at 952–53.

173. 548 F.2d 753, 757 (8th Cir. 1977).

174. 76 F.3d at 951, 952–53. In *Sell*, the court agreed that "the question of whether plaintiffs' interest in the moneys constituted 'property' shall be determined by reference to Nebraska law." 548 F.2d at 757. The court held that Nebraska law gave the plaintiffs a "possessory interest" in the money amounting to "property" within the meaning of the Fourteenth Amendment. Id.

cided prior to *Sandin* and relied on state law, demonstrates the Eighth Circuit's view that *Sandin* did not alter the property analysis.

c. *Ninth Circuit.* — While the Ninth Circuit has also expressly declined to decide whether *Sandin* applies to property interests in prison,[175] several cases have shown support for the Fifth Circuit's approach. For example, in *Martin v. Upchurch*, the court separated the analyses when an inmate claimed both a liberty and a property interest.[176] Prison officials had terminated the inmate from his prison job, reclassified him at higher risk, and deprived him of visitation and phone privileges.[177] The court held that the inmate had no liberty interest because the deprivation was not "atypical and significant" under *Sandin*.[178] The court held that the prisoner had no property interest, however, because state law made prison employment a discretionary decision by officials, and Martin had failed to cite any prison regulations mandating particular reclassification procedures.[179]

Similarly, in 2003, in *Vance v. Barrett*, the court looked to a pre-*Sandin* decision to find a property interest.[180] In *Vance*, the prison had conditioned prison employment on a waiver of property rights in prison trust accounts and confiscation of inmates' accrued interest.[181] The plaintiffs had refused to sign the agreement and were subsequently fired.[182] The court stated that they had "little trouble concluding that Vance has such a protected right to accrued interest on his inmate accounts," citing several cases decided before *Sandin* that had looked to plain language in relevant statutes to hold that a prisoner had a property interest in accrued interest.[183] By following these pre-*Sandin* decisions, which looked to statutes' language to determine that a property interest existed, the Ninth Circuit simply assumed that *Sandin* had not altered the analysis for property.

3. *Developments and Concerns with the Majority Approach.* — The circuits that have limited *Sandin* have faced some difficulties in applying two sep-

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175. See Owens v. Ayers, No. C01-3720 SI (PR), 2002 WL 73226, at *2 (N.D. Cal. Jan. 15, 2002) ("The Ninth Circuit has not yet determined whether *Sandin* applies to a prisoner's property claim.").

176. No. 93-16907, 1995 WL 563744, at *2–*3 (9th Cir. Sept. 22, 1995).

177. Id. at *1.

178. Id. at *2.

179. Id. at *2 n.2.

180. 345 F.3d 1083, 1088 n.6 (9th Cir. 2003).

181. Id. at 1086–87. In this case, inmates were required, by statute, to keep their money in a personal property trust fund run by the State of Nevada to avoid problems that would arise if inmates could keep monies in their cell. Id. at 1086. Any money earned by an inmate was credited to the account, and any money sent to the inmate from outside sources was deposited there. Id.

182. Id. at 1087.

183. Id. at 1088 n.6; see also id. at 1090 ("Without underlying authority and competent procedural protections, [the prison] could not have constitutionally confiscated the net accrued interest.").

arate standards for property and liberty. The dissenting opinion in *Burns v. Pennsylvania Department of Corrections* aptly articulated these concerns.[184] In *Burns*, an inmate alleged a deprivation of property when the Department of Corrections assessed his inmate account, but he did not claim any liberty deprivation for 180 days of disciplinary custody related to the same incident.[185] The dissent stated that, while disciplinary custody is "plainly more significant," Burns's "strategy to allege a deprivation of property rather than liberty is understandable in light of . . . *Sandin v. Conner*."[186] While the dissent agreed that *Sandin* does not control for property, it asserted that courts should evaluate property interests "[i]n light of the substantial narrowing of the inmate's liberty interests in *Sandin*" and ensure that their definition of property is "consistent with [*Sandin*'s] teachings."[187] The dissent also criticized the majority for elevating "an inmate's property rights over his liberty rights."[188]

This anomalous result is further illustrated in the decision of *Smiley v. Ponto*.[189] In *Smiley*, the court found that an inmate had partaken in "conduct which disrupts," a major disciplinary violation, due to his apparent involvement in the wiping of a computer's hard drive at his prison job.[190] The prison imposed a sanction of thirty days of disciplinary segregation and ordered $8,400 restitution.[191] Observing that the inmate actually served less than thirty days and that the conditions in disciplinary segregation did not dramatically differ from ordinary prison conditions, the court held the prisoner had no liberty interest in avoiding disciplinary segregation under *Sandin*.[192] However, the court found a property interest in money received from outside sources under *Mahers*, which had itself relied on a pre-*Sandin* decision finding a property interest in the language of a state law.[193] Therefore, while no process was due regarding the segregation, the prison must provide due process if the $8,400 appropriation comes from money the prisoner received from outside sources.[194]

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184. 544 F.3d 279, 291–296 (3d Cir. 2008) (Hardiman, J., dissenting); see supra Part II.A.1.b (discussing majority opinion in *Burns*).

185. 544 F.3d at 281, 285 (majority opinion).

186. Id. at 292 (Hardiman, J., dissenting) (citing 515 U.S. 472, 486 (1995)).

187. Id. at 293 (citing 515 U.S. 472).

188. Id. at 296.

189. No. CIV. 05-4094, 2007 WL 914025 (D.S.D. Mar. 23, 2007).

190. Id. at *1.

191. Id at *2.

192. Id. at *3–*4.

193. Id. at *4 (citing Mahers v. Halford, 76 F.3d 951, 954 (8th Cir. 1996)); see supra notes 171–174 and accompanying text (discussing *Mahers*).

194. 2007 WL 914025, at *4. The court did not find a property interest in money taken from the inmate's wages, as the state has the discretion to determine wages. Id.

B. *Minority Approach: Extending* Sandin

While the majority of circuits have limited *Sandin*, a few have applied it to all prisoners' due process claims, merging the analyses of property and liberty. The Tenth Circuit split from the majority approach in 1999 in *Cosco v. Uphoff*.[195] Since then, the Seventh Circuit has demonstrated support for the Tenth Circuit approach but has not been as consistent in its application.[196] This section lays out the reasoning of the Tenth Circuit, which created the split. It then discusses the Seventh Circuit's support for the Tenth Circuit's approach. Finally, it discusses the effects the circuits are trying to achieve in applying this approach, including the realization of *Sandin*'s purposes and its effect on prisoners' ability to raise due process claims.

1. *Overview of the Tenth Circuit Approach.* — The Tenth Circuit has forcefully rejected the majority approach limiting *Sandin* to prisoners' liberty interests.[197] Instead, the circuit applies *Sandin*'s "atypical and significant" standard to all prisoners' due process claims. The circuit first applied *Sandin* to property interests in *Cosco v. Uphoff*.[198] In *Cosco*, the court held that new prison regulations, which limited the hobby and legal materials that prisoners could keep in their cells, did not deprive inmates of a protected property interest because they did not create an "atypical and significant hardship" under *Sandin*.[199] In deciding to apply *Sandin*, the circuit criticized the plaintiff's reliance on mandatory language in regulations as "precisely the methodology rejected by the Supreme Court in *Sandin*."[200] The court instead concluded that *Sandin* "foreclosed the possibility of applying the *Hewitt* methodology to derive protected property interests in the prison conditions setting."[201]

While the court recognized the opinion would create a circuit split, it determined that its interpretation could not be avoided. The court stated, "[W]e do not see how the Supreme Court could have made clearer its intent to reject the *Hewitt* analysis outright in the prison con-

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195. 195 F.3d 1221, 1222–24 (10th Cir. 1999); see infra Part II.B.1 (discussing Tenth Circuit's approach).

196. See infra Part II.B.2 (discussing inconsistency in Seventh Circuit's approach).

197. See infra notes 200–203 and accompanying text (discussing Tenth Circuit's approach).

198. 195 F.3d at 1223–24.

199. Id at 1224. This claim arose when, for safety reasons, the Wyoming Department of Corrections adopted a policy limiting the amount of property prisoners could keep in their cells. Id. at 1222. The plaintiffs, relying on *Hewitt*, claimed that the mandatory language in the prior regulations created a constitutionally protected right to keep the disputed property in their cells; therefore, enforcing the new policy without hearings violated their right to due process. Id. at 1223. Rejecting this argument, the *Cosco* court did not look at the relevant regulations but only whether the change in policy was atypical and significant. Id. at 1224.

200. Id.

201. Id. at 1223.

text."[202] Instead, in the due process inquiry for both property and liberty interests, the court must focus on "'the nature of the deprivation,'" not "'the language of a particular regulation,'" and must ask whether there is an atypical and significant hardship.[203] The court stated that its conclusion was necessary to avoid the concerns articulated in *Sandin*, including "*Hewitt*'s 'two undesirable effects': (1) creating disincentives for states to codify management procedures, and (2) entangling federal courts in day-to-day management of prisons."[204] The court "further bolstered" its position by stating that it was unlikely the Supreme Court "would establish a standard in the prison setting more sensitive to property interests than liberty interests."[205] Thus, the Tenth Circuit applied *Sandin* to property to remain faithful to the *Sandin* Court, address its concerns, and avoid a nonsensical dichotomy between property and liberty.

2. *Seventh Circuit Support for the Tenth Circuit Approach.* — The Seventh Circuit has also opted to extend *Sandin* to all prisoners' due process claims. However, the circuit has been less consistent in its approach. The circuit first considered extending *Sandin* in *Abdul-Wadood v. Nathan*.[206] In that case, prison officials fined an inmate fifty cents, issued a reprimand, and suspended his commissary privileges for improper possession of string and torn socks.[207] While the circuit did not directly apply *Sandin*, it cited the opinion in an attempt to "fortif[y]" its conclusion that minor disciplinary penalties "do not implicate any liberty or property interest."[208] The court thus concluded that summary judgment for the defendants in this case was "wholly proper."[209]

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202. Id.

203. Id. at 1223–24 (quoting Sandin v. Conner, 515 U.S. 472, 481 (1995)).

204. Id. at 1223.

205. Id. at 1223 n.4.

206. 91 F.3d 1023 (7th Cir. 1996).

207. Id. at 1025. Possession of these items was prohibited because of their potential use as a garrote. Id.

208. Id. Subsequently, in *Logan v. Gillam*, the circuit showed firm support for applying *Sandin* to property, interpreting *Nathan* to hold that "[a]lthough *Sandin* involved a claim that a regulation created a *liberty* interest, its analysis also applies to claims that prison regulation create federally-enforceable property interests." No. 94-3794, 1996 WL 508618, at *3 (7th Cir. Aug. 30, 1996). In *Logan*, an inmate claimed a violation of due process when he was rehired to a prison job at a lower pay rate than was required by prison policy. Id. at *1. The court, in finding no protected interest, stated that the regulation requiring rehired workers to receive their previous pay rate did not protect inmates from an "atypical and significant hardship," and therefore the inmate had no property interest. Id. at *3. However, the significance of this support is diminished by several Seventh Circuit decisions that cast doubt on the court's willingness to extend *Sandin* to property. See Ledford v. Sullivan, 105 F.3d 354, 357 (7th Cir. 1997) (citing *Roth* to determine inmate did not have protected property right in prescription medication because relevant statute grants prison officials discretion in providing inmates with medical care and "lacks the substantive limitations" necessary to create property interest); Abdul-Wadood v. Bayh, No. 95-1245, 1996 WL 219068, at *1–*2 (7th Cir. Apr. 30, 1996) (holding, without mentioning

However, in 2011, the Seventh Circuit, while still expressing support for the Tenth Circuit approach, expressly stated in *Tenny v. Blagojevich* that it had not taken a definite position on the circuit split.[210] In *Tenny*, inmates sued the Department of Corrections for marking up the price of commissary goods beyond the statutory cap.[211] The court held that due process was not required because the Department acted illegally; therefore, the deprivation could not have been prevented by pre-deprivation process.[212] The court thereby avoided directly addressing the circuit split over *Sandin*'s application to property. However, the court stated there was a strong case that "the reasoning of *Sandin* . . . should extend to statutorily created property interests."[213]

3. *Developments Since the Split: Prudential Effects.* — The application of *Sandin* to property has substantially heightened the standard for prisoners to claim due process protection and has called into question pre-*Sandin* cases that had found protected interests.[214] For example, in *Steffey v. Orman*, the Tenth Circuit applied *Sandin* to find that an inmate had no property interest in the receipt of a fifty-dollar money order sent to the inmate in violation of prison regulations.[215] The court held the confiscation of the money order did not impose an atypical and significant burden, and therefore the inmate was not entitled to due process.[216] In so holding, the court called into question dicta from a pre-*Sandin* decision, which had stated that inmates have a property interest in money orders from friends and family.[217] The court in *Steffey* stated that since the prior decision was before *Sandin,* it was of questionable validity because prisoners' property interests are now determined on the basis of "'atypical and significant' deprivation."[218]

Sandin, no property interest existed in interest accrued on inmate's trust account because language of relevant state law did not create any possessory right to interest).

209. 91 F.3d at 1025.

210. 659 F.3d 578, 581 & n.3 (7th Cir. 2011).

211. Id. at 579–80.

212. Id. at 582. The holding results from Parratt v. Taylor, 451 U.S. 527, 541 (1981), which held that due process does not apply to property deprivations resulting from "random and unauthorized" action, so long as the state has an adequate post-deprivation procedure. Therefore, since the illegal actions of the Department could not have been prevented, and the inmates did not allege inadequate post-deprivation remedies, their claim must fail under *Parratt*. See also infra notes 264–266 and accompanying text (discussing *Parratt*).

213. 659 F.3d at 581 n.3.

214. See supra note 134 and accompanying text (discussing effects of *Sandin* standard on prisoners' ability to raise due process claims).

215. 461 F.3d 1218, 1220–21 (10th Cir. 2006).

216. Id. at 1222–23.

217. Id. at 1223 n.4. The pre-*Sandin* case was Gillihan v. Shillinger, 872 F.2d 935, 938 (10th Cir. 1989).

218. 461 F.3d at 1223 n.4.

Another Tenth Circuit decision, *Clark v. Wilson*, further highlights the ability of *Sandin*'s standard to remove protection from previously recognized property interests.[219] In *Clark*, the court stated that in light of *Sandin*, a previous decision, *Gillihan v. Shillinger*, which held that prisoners have a property interest in their prison trust accounts, was no longer good law.[220] Therefore, a prison official who froze the inmate trust funds of the plaintiff Clark was entitled to qualified immunity because the "right" he violated was no longer clearly established.[221]

These decisions demonstrate that applying *Sandin* to property can significantly limit prisoners' protected interests. Almost all of the opinions applying *Sandin* to property interests have failed to find a protected interest, even when one had previously been recognized.[222] While this may serve efficiency goals that *Sandin* articulated, it may go too far, completely eliminating protections for prisoners' property rights in the circuits that apply *Sandin*.[223]

III. ASSESSING THE CIRCUIT SPLIT: *SANDIN* AND PROPERTY, AN ILLOGICAL MIX

The Supreme Court's adoption of the "atypical and significant" test for liberty interests in *Sandin* dramatically limited the scope of prisoners' protected liberty. Today, the circuits have split on whether the Court in *Sandin* also intended to change the analysis for prisoners' property interests. This Part critically examines the reasoning of the courts that have weighed in on this circuit split. It then suggests that the courts that have limited *Sandin* to liberty and continued to apply *Hewitt* to property have properly interpreted *Sandin*. This approach is not only faithful to the Supreme Court's holding in *Sandin*, but it continues to apply a standard

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219. 625 F.3d 686 (10th Cir. 2010).

220. Id. at 691; see also *Gillihan*, 872 F.2d at 938.

221. 625 F.3d at 691–92. The prison official froze the account in response to a garnishment summons served on the Oklahoma Department of Corrections after the victim of Clark's crime received a civil judgment against Clark. Id. at 688; see also supra note 164 (discussing standard to raise qualified immunity defense).

222. See supra notes 214–221 and accompanying text (discussing cases in which application of *Sandin* has removed protection from previously recognized property interests).

223. Of the cases that this Note's author found, only one, Barone v. Hatcher, 984 F.Supp. 1304 (D. Nev. 1997), found a property interest when applying *Sandin*. In *Barone*, the plaintiff, who allegedly stole $100 from a fellow inmate, was sentenced to disciplinary segregation and ordered to repay the money. The district court upheld the Magistrate Judge's conclusion that deprivation of funds in an inmate account constituted an "atypical and significant hardship" under *Sandin*; therefore, the inmate possessed a property interest in avoiding the imposition of restitution. Id. at 1311–12. Interestingly, the court found no liberty interest under *Sandin* in remaining free from disciplinary segregation—in which the inmate was placed for 365 days—because it is similar to administrative segregation and did not affect the duration of his confinement. Id. at 1311.

that has traditionally defined property interests both inside and outside the prison context.

This Part first evaluates the reasoning of the circuits that have limited *Sandin*, and concludes that both *Sandin* and the traditional liberty and property divide support continuing to use *Hewitt* in the context of property, despite the criticisms of *Hewitt* that led to *Sandin*. It then evaluates the reasoning of those courts that have extended *Sandin*, and concludes that their reliance on *Sandin*'s concerns over "undesirable effects" is misplaced in the property context.[224]

A. *The Advantages of the Majority Approach:* Sandin *Was Not Intended To Extend to Property*

The circuits that concluded *Sandin* does not extend to property relied on the lack of any evidence that the Supreme Court contemplated property interests in the *Sandin* decision.[225] This section evaluates whether this narrow reading of *Sandin* makes sense within the language of the Supreme Court's opinions and within the larger context of judicial treatment of liberty and property, and concludes that *Sandin*'s analysis of liberty is incompatible with property.

1. *The Supreme Court's Focus on Liberty.* — Circuit courts limiting *Sandin* stated that it only discussed liberty, and therefore its analysis is inappropriate in the property context. The incompatibility of *Sandin*'s reasoning with property is apparent after considering the situation faced in *Sandin*, involving disciplinary segregation, and the resulting Supreme Court analysis, which necessarily focused on the nature of an asserted liberty interest.[226] In deciding that Conner did not possess a liberty interest, the Court looked to various factors applicable to "liberty" to decide what conditions were within the confines of an ordinary prison sentence, and therefore acceptably taken as part of Conner's lawful incarceration.[227] By limiting liberty interests "generally . . . to freedom from restraint which . . . imposes [an] atypical and significant hardship," the Court demonstrated its concern with only those conditions that exceed an inmate's lawful sentence, such as those that affect the duration of im-

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224. See supra note 204 and accompanying text (discussing "undesirable effects" of *Hewitt*); see also supra notes 96–100 and accompanying text (discussing concerns of *Sandin* majority).

225. See supra Part II.A (discussing approach taken by majority of circuits).

226. The Supreme Court's limited focus was due to the fact that Conner's situation involved only liberty, the interest in remaining free from the conditions of disciplinary segregation, which affected his physical conditions. Sandin v. Conner, 515 U.S. 472, 474–77 (1995).

227. See supra notes 101–105 and accompanying text (discussing majority's application of its newly devised "atypical and significant" test to conditions of disciplinary segregation faced by Conner).

prisonment or that significantly limit freedom beyond what would normally be expected during incarceration.[228]

Subsequent Supreme Court jurisprudence expanded the discussion of the proper scope of prisoners' liberty.[229] These discussions did not focus on general due process, but looked specifically at what is encompassed within the word "liberty."[230] This focus on liberty is also demonstrated in lower courts' application of *Sandin*, which finds liberty interests more often when a deprivation affects inmates' ability to leave prison (and thus the possibility of an end to their incarceration) than when a deprivation affects conditions within prison (and thus represents a continuation of the lawful sentence).[231] This focus on liberty from the institution involves just that—liberty—and does not appear applicable to property, a separate and distinct interest that does not involve physical freedom, but personal entitlements.

2. Sandin*'s "Liberty" Analysis Is Incompatible with Property.* — The distinction between "liberty" and "property" illuminates why an analysis focused on freedom from restraint has no application to property.[232] The due process protection of property and liberty aims to curb arbitrary government action; however, the essence of each protection is different. While liberty is a negative right, which protects individuals from government action and restrictions on freedom, property often involves positive rights, which protect individuals from government inaction once law has conferred a property interest.[233] Therefore, "freedom from restraint," while applicable to liberty, does not make sense when the challenged action is government failure to confer a state-created property interest.

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228. *Sandin*, 515 U.S. at 484.

229. See supra Part I.C.4 (discussing post-*Sandin* developments).

230. See Wilkinson v. Austin, 545 U.S. 209, 223–25 (2005) ("[T]he touchstone of the inquiry into the existence of a protected . . . liberty interest . . . is not the language of regulations regarding those conditions but the nature of those conditions themselves . . . ."); see also supra notes 123–128 and accompanying text (discussing *Wilkinson*'s detailed analysis of liberty).

231. See supra notes 130–133 (discussing cases that have followed this pattern).

232. See Jeffries v. Tenn. Dep't of Corr., 108 S.W.3d 862, 871 (Tenn. Ct. App. 2002) (stating that *Sandin*'s focus on "freedom from restraint" cannot apply to prisoner's property because its "holding that due process is not necessary as long as the prisoner's punishment is not disproportionate to the rigors of prison life does not apply when the actions of a prison official deprive a prisoner of his or her property."). While courts have vacillated between treating liberty and property differently and collapsing their analyses, it is generally agreed that the interests aim to protect distinct categories of rights. See Cosco v. Uphoff, 195 F.3d 1221, 1223 n.4 (10th Cir. 1999) (discussing difference in treatment of property interests and liberty interests by Supreme Court).

233. See supra Part I.A.1 (discussing differences between property and liberty interests).

Breyer's dissent in *Sandin* further illuminates why the "freedom from restraint" language cannot apply to property.[234] While Breyer criticized the majority for not recognizing the value of looking to nonconstitutional law for prisoners' liberty interests, he also recognized that the "justification for looking at local law is not the same in the prisoner liberty context" as it is in the property context[235]:

> In protecting property, the Due Process Clause often aims to protect *reliance*, say, reliance upon an "entitlement" that local . . . law itself has created or helped to define. . . . In protecting liberty, however, the Due Process Clause protects, not this kind of reliance upon a government-conferred benefit, but rather an absence of government restraint, the very absence of restraint that we call freedom.[236]

The difference in rationales for looking to state law supports the conclusion that *Sandin*, while affecting state-created liberties, was not meant to affect state-created property, which is analyzed through state statutes and regulations for entirely separate reasons than liberty.

3. *Inconsistencies of* Hewitt *Are Not a Concern in Property Context.* — Applying *Hewitt* to property raises the concern that the inconsistencies and criticisms that led to *Sandin* will continue to exist as long as *Hewitt* is applied.[237] In fact, the use of *Sandin* for liberty and *Hewitt* for property may exaggerate inconsistent results, allowing severe changes in confinement to go unprotected as not "atypical and significant," while protecting seemingly less significant property interests, such as money received or recreational programs.[238] This result, in turn, raises the possibility that prisoners will strategically raise property claims over liberty claims.[239] Several courts have already articulated these concerns, as the standards appear to afford more protection for property rights than liberty rights, a counterintuitive result.[240]

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234. See Sandin v. Conner, 515 U.S. 472, 497–98 (1995) (Breyer, J., dissenting) (discussing difference between protecting property and protecting liberty).

235. Id. at 497.

236. Id. at 497–98 (citations omitted).

237. See supra Part I.B.2 (discussing trends leading to *Sandin*).

238. For example, in the case of Smiley v. Ponto, No. CIV. 05-4094, 2007 WL 914025 (D.S.D. Mar. 23, 2007), the court found a property interest in avoiding a restitution payment, but found no liberty interest in avoiding disciplinary segregation. Id. at *4; see also supra notes 189–194 and accompanying text (discussing *Smiley* decision).

239. See supra notes 184–188 and accompanying text (discussing case in which dissent believed prisoner strategically asserted property interest instead of liberty interest in light of *Sandin*).

240. See Cosco v. Uphoff, 195 F.3d 1221, 1223 n.4 (10th Cir. 1999) (supporting decision to extend *Sandin* to property because it is unlikely the Supreme Court "would establish a standard in the prison setting more sensitive to property interests than liberty interests"); see also Burns v. Pa. Dep't of Corr., 544 F.3d 279, 296 (3d Cir. 2008) (Hardiman, J., dissenting) (arguing applying *Hewitt* to property elevates "inmate's property rights over his liberty rights").

However, this contention fails to recognize that property and liberty are separate rights[241] that are restricted in prisons for distinct reasons. When looking at the difference in the justifications for restricting liberty and property in prison, it is clear that *Sandin* does not result in higher protections for property. These differences also demonstrate why, while *Sandin* may accurately define a prisoner's liberty, *Hewitt* is more appropriate for property.

Prisoners' liberty is restricted as part of their sentence for various reasons, including punishment.[242] Therefore, when determining whether a prisoner has a liberty interest, courts must distinguish what in fact was taken as part of the lawful prison sentence and what elements of liberty remain protected.[243] The courts' previous reliance on state statutes and regulations was itself an attempt to ease this line-drawing,[244] even though courts initially developed the state-created interest doctrine to recognize new sources of property.[245] However, the *Sandin* court created a new analysis to help distinguish these boundaries. *Sandin* used ordinary prison conditions as a baseline for deprivations consistent with a lawful criminal sentence and distinguished them from "atypical and significant" changes, which may extend beyond what was imposed by the sentence, thereby implicating a liberty interest retained by the prisoner.[246]

Prisoners' property rights, by contrast, are limited for practical reasons aimed at institutional security.[247] Therefore, there is little reason to deviate from the state-created interest doctrine, in which property has

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241. See supra Part III.A.2 (discussing differences between liberty and property interests).

242. As the *Wilkinson* Court stated, "Prisoners held in lawful confinement have their liberty curtailed by definition." Wilkinson v. Austin, 545 U.S. 209, 225 (2005). While punishment for crimes is one significant goal of incarceration, four distinct purposes—retribution, deterrence, incapacitation, and rehabilitation—are usually endorsed, with society vacillating between the relative importance of each. See Michele Cotton, Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment, 37 Am. Crim. L. Rev. 1313, 1315–18 (2000) (discussing various articulated purposes of criminal punishment adopted by scholars, courts, and legislatures).

243. See Lee, supra note 18, at 791 ("Judicial weariness with prison litigation reflects in part the difficulty of distinguishing between the lawful deprivation of liberty represented by imprisonment, and the margin of constitutional rights and liberty retained by prisoners.").

244. See Goldman, supra note 39, at 431–33 (discussing transition from *Morrissey* to *Wolff*); supra notes 40–47 and accompanying text (describing reasons for collapsing property and liberty analyses in prison context).

245. See supra Part I.A (discussing development of procedural protections for "new property" created by independent sources of law).

246. Sandin v. Conner, 515 U.S. 472, 483–84 (1995); see also supra Part I.C.2 (discussing *Sandin*'s new test for prisoners' liberty interests).

247. See supra note 41 and accompanying text (explaining security concerns justifying traditional limits to prisoners' property rights).

always found its roots.[248] What a prisoner may ordinarily face during a criminal sentence or whether the deprivation he faces is atypical is irrelevant to whether a property interest exists. Instead, consistent with the purpose of due process to protect against arbitrary government action, the *Hewitt* methodology relies on state statutes and regulations to determine which property interests prisoners retain and which are necessarily limited for legitimate administrative reasons.[249] This approach ensures that once state law has created a reasonable expectation of a property interest, it may not be arbitrarily revoked.[250]

B. *Responding to the Minority: Applying* Sandin *Is Not Necessary To Ameliorate Its Concerns*

Circuit courts that apply *Sandin* to prisoners' property interests concluded that the extension is necessary to promote the goals *Sandin* aimed to address by rejecting the *Hewitt* approach.[251] However, the question remains whether the interest in serving these goals is sufficient to overcome the fact that the Supreme Court focused solely on defining liberty and did not attempt to define property. In answering this question, this section first looks to whether extending *Sandin* in fact serves the goals articulated by the Supreme Court. It then analyzes whether *Sandin*'s reasons are as persuasive in the property context in light of other limitations that already exist for property. Finally, it looks to the practical effects of *Sandin* in the circuits that extend its analysis to property and concludes that this approach as applied to property may go too far in limiting prisoners' rights in favor of judicial efficiency.

1. *Serving the Goals of* Sandin*: Judicial Efficiency and Deference.* — Circuit courts that apply *Sandin* to property aim to promote *Sandin*'s goals, including limiting frivolous claims and decreasing judicial interference in prison management.[252] While a return to the hands-off doctrine of prisoner rights[253] would inevitably serve these goals, the Court in *Sandin*

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248. See *Sandin*, 515 U.S. at 497–98 (Breyer, J., dissenting) ("In protecting property, the Due Process Clause often aims to protect *reliance* . . . upon an 'entitlement' that local (*i.e.*, nonconstitutional) law itself has created or helped to define."); Plaintiffs-Appellants' Consolidated Reply Brief at 7, Tenny v. Blagojevich, 659 F.3d 578 (7th Cir. 2011) (Nos. 10-3075, 10-3076, 10-3077, 10-3078, 10-3106, 10-3140, 10-3169), 2011 WL 2678755, at *7 ("It makes little sense to apply *Sandin* to determine if a property interest exists because *every* property interest depends upon an expectation created by state law.").

249. See supra notes 56–63 and accompanying text (discussing *Hewitt* methodology).

250. See Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government." (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889))).

251. See supra Part II.B (discussing approach of circuits extending *Sandin* to property).

252. See supra Part I.C.2 (discussing goals and rationale of *Sandin* analysis); supra Part II.B (discussing circuits' decision to apply *Sandin* to property).

253. Until the mid-twentieth century courts subscribed to the hands-off doctrine, which maintained that prisons are the responsibility of the legislative and executive

did not support such a drastic limitation. Instead, the Court rejected *Hewitt* for liberty and created a standard to balance goals of judicial efficiency and deference with protections for legitimate interests.[254] However, by not addressing many issues, including *Sandin*'s applicability to property, the Court left undefined the degree to which prisoner rights should be limited to serve *Sandin*'s goals.

The circuits extending *Sandin* concluded that the problems that *Hewitt* created were analogous to the property context; therefore, these circuits assumed *Sandin* should apply.[255] Citing the concerns of the Supreme Court, these circuits have dismissed many prisoners' suits, undoubtedly decreasing the ability of prisoners to raise due process claims and thereby serving *Sandin*'s efficiency and deference goals.[256] However, these circuits have not addressed the argument that the concerns articulated in *Sandin* may be less persuasive in the property context, and that *Sandin*'s extension may not in fact be necessary to achieve the Court's goals.

2. *Alternative Restraints on Prisoners' Ability To Raise Property Interests.* — While applying *Sandin* to property interests will undeniably increase deference to prison officials and limit prisoners' ability to bring claims, it may go too far in fulfilling *Sandin*'s goals in light of other restrictions which already apply to property claims. For this reason, *Sandin*'s concerns prove less persuasive in the property context.

First, property interests have never engendered the degree of protection which developed around liberty;[257] therefore, the concerns over

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branches and outside the jurisdiction of courts. Pursuant to this doctrine, courts were generally unwilling to recognize that prisoners retained any rights after conviction, including the right to bring a claim in federal court. Courts rationalized that judicial review would undermine prison security and raise separation of powers concerns. See, e.g., Numer v. Miller, 165 F.2d 986, 986–87 (9th Cir. 1948) ("It is not [the court's] province to supervise prison discipline."); Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) ("[A prisoner] has . . . not only forfeited his liberty, but all his personal rights . . . . He is for the time being the slave of the State."). See generally John W. Palmer, Constitutional Rights of Prisoners 351 (2010) (discussing rationale for hands-off doctrine); Herman, Slashing, supra note 64, at 1238–42 (discussing effects of hands-off doctrine).

254. See Sandin v. Conner, 515 U.S. 472, 482–84 (1995) (analyzing problems of *Hewitt*, but recognizing need for courts to preserve prisoners' liberty interests); supra Part I.C (discussing *Sandin* Court's rejection of *Hewitt* and creation of new test).

255. See supra Part II.B (discussing circuits extending *Sandin* to property context and their recognition of inconsistencies in *Hewitt* approach); see also Chase, supra note 17, at 592–93 ("The reasons given by the [*Sandin*] Court for looking at the weight of the deprivation . . . are directly analogous to reasons offered for broadening the jurisprudence of identifying protected property interests.").

256. See supra Part II.B.3 (discussing ability of *Sandin* to eliminate previously protected property interests).

257. See Thomas W. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 966–67 (2000) (stating that courts have never extended definition of property to include all limitations on official discretion, and thus, by "[r]equiring that the threatened government action seek to terminate an entitlement [courts] help[] allocate procedural

floods of litigation are not realized in the property context.[258] Second, the existence of the second step of the due process analysis, which determines what process is due, further diminishes the ability of prisoners to succeed on due process claims.[259] Due to the more everyday nature of property interests, the degree of process which will be necessary to satisfy due process will likely be much less, such as a notification or brief statement of reasons.[260] Therefore, whether or not a property interest is found, the prisoner's claim may still not prevail as long as sufficient process is given. This not only allows courts to give deference to the process chosen by the state or prison but also eliminates disincentives to regulation, because even when state law creates a property interest, sharp limitations exist on the amount of process.[261]

Lastly, additional constraints on the ability of prisoners to raise claims, and particularly property due process claims, further demonstrate that extending *Sandin* is unnecessary. For example, around the same time as *Sandin*, Congress passed the Prisoner Litigation Reform Act (PLRA), substantially limiting prisoners' access to courts by increasing pleading and exhaustion requirements.[262] The PLRA dramatically decreased the flood of litigation caused by prisoner complaints.[263] Addition-

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due process rights to the types of claims that are most deserving of due process protection").

258. Id. ("In contrast to the flood of litigation by prisoners raising new liberty claims, there is no sign of increasing numbers of cases raising new property claims.").

259. For example, while the dissenting Justices in *Sandin* would have found a liberty interest to exist, they believed that Conner would have still failed in claiming a due process violation because sufficient procedural protections had been given. See supra notes 112, 119 and accompanying text.

260. In addition to protecting prisoners from arbitrary deprivations, simple statements of reasons can serve important goals, such as promoting dignity values, without imposing difficult administrative burdens on prisons. See generally Robert L. Rabin, Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement, 44 U. Chi. L. Rev. 60 (1976) (arguing that, in addition to value of accurate decision, procedural safeguards afforded to property interests can also serve interest in "reasoned explanation" that can be secured without significant costs). Further, a statement of evidence and reasons could promote care in decisionmaking, help to ensure the decision was not grounded in erroneous information, and aid inmates' rehabilitation by providing them with the assurance that the proceedings in which they were involved were conducted fairly. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 39–41 (1979) (Marshall, J., dissenting in part) ("It simply is not unduly 'burdensome to give reasons when reasons exist.'" (quoting Bd. of Regents v. Roth, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting))).

261. Some commentators have even suggested that assuming a protected interest in every case and then engaging in the analysis of what process is due would be a "more efficient means of deciding prisoners' due process cases." E.g., Lee, supra note 18, at 841.

262. See supra note 79 and accompanying text (discussing other limitations which exist on prisoners' ability to raise constitutional claims, including PLRA).

263. See Schlanger, supra note 76, at 1584–85 ("The 1996 enactment of the PLRA caused the number of filings to drop precipitously, and filings have so far continued to decline slightly each year."). In fact, in 1995 there were approximately 24.6 filings per

ally, in 1981 the Supreme Court placed significant limitations on prisoners' ability to raise property interest claims in *Parratt v. Taylor*.[264] In *Parratt*, the Court held that so long as states provide adequate post-deprivation procedures, prisoners cannot allege a due process violation if they are deprived of property as a result of "random and unauthorized" action by a prison official.[265] The *Parratt* doctrine therefore limits a prisoners' ability to bring property interest claims alleging insufficient pre-deprivation process to situations in which prison policies themselves cause the deprivation or in which the deprivation is otherwise sanctioned by the prison or state.[266]

In light of the restraints on prisoner property interests that already exist, the circuits' rationale for extending *Sandin* as necessary to achieve its goals is an unconvincing reason to alter the due process analysis for property. The Supreme Court did not speak explicitly or implicitly about property interests in its discussions of *Sandin*.[267] Thus, the Court did not intend to extend *Sandin* to property and aimed only at altering the analysis of prisoners' liberty claims.

These restrictions, as well as the nature of property generally,[268] demonstrate that additional limitations imposed by *Sandin*'s analysis will result in a devastating restriction, if not total elimination, of prisoners' property interests.[269] While the Supreme Court in *Sandin* felt it necessary to increase judicial efficiency by weeding out frivolous prisoner suits, it is unlikely the Court would implicitly support the elimination of an entire constitutional right for prisoners without mentioning the application of its new standard to that right.

1,000 inmates, compared to 1997, when there were approximately 15.0 filings per 1,000 inmates. Id. at 1583. In 2001, the rate was down to 11.4 filings per 1,000 inmates. Id.

264. 451 U.S. 527 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 330–31 (1986).

265. Id. at 541.

266. See supra note 212 and accompanying text (describing case, *Tenny v. Blagojevich*, in which property interest was dismissed under *Parratt*).

267. See supra Part III.A.1 (discussing Supreme Court's focus on defining liberty, not property).

268. See supra notes 20–24 and accompanying text (discussing reasons for granting due process protection to property); see also Plaintiffs-Appellants' Consolidated Reply Brief at 7, Tenny v. Blagojevich, 659 F.3d 578 (7th Cir. 2011) (Nos. 10-3075, 10-3076, 10-3077, 10-3078, 10-3106, 10-3140, 10-3169), 2011 WL 2678755, at *7 ("It makes little sense to apply *Sandin* to determine if a property interest exists because *every* property interest depends upon an expectation created by state law.").

269. While scholarship on this point has only discussed liberty, the ability of the *Sandin* standard to eliminate all state-created interests is plausible, because *Sandin* sets the standard so high as to invoke the Constitution directly, leaving no room for interests created by independent sources of law. See Weisman, supra note 8, at 918–19 (stating *Sandin*'s approach may practically eliminate state-created liberty interests); cf. Sandin v. Conner, 515 U.S. 472, 490 n.2 (1995) (Ginsburg, J., dissenting) (criticizing majority for creating "category of liberty interest that is something less than the one the Due Process Clause itself shields, something more than anything a prison code provides").

Therefore, *Sandin*'s focus on defining liberty is incompatible with notions of property. The *Sandin* analysis may be a helpful aid to determine when a restriction is so atypical and significant as to fall outside the sphere of lawful incarceration. However, this standard is inapplicable to property, which is defined by state law and restricted within prisons only indirectly as a necessary component of life within an institution. While extending *Sandin* to property may increase judicial efficiency and deference to prison officials, it may go too far in limiting prisoners' property interests so as to eliminate them completely. Since there are alternative methods to accomplish the goals of *Sandin* without such drastic results, *Sandin* is not only inappropriate, but unnecessary in the property context.

CONCLUSION

This Note examines the disagreement among the circuits on the application of the Supreme Court decision *Sandin v. Conner* to determine when a prisoner has a property interest deserving due process protection. It demonstrates that the arguments of the Tenth and Seventh Circuits extending *Sandin* to property rights are flawed, and argues that courts should follow the approach taken by the majority of circuits that continue to apply *Hewitt* to property.

Certainly, many of the concerns that the Tenth Circuit articulates are legitimate. There exists a dramatic difference in filing rates between inmates and noninmates that supports assertions of floods of litigation.[270] A degree of deference to prison administrators is also appropriate, as prison officials must regulate all aspects of prison life to ensure the safety of the institution. However, these concerns themselves are insufficient to extend *Sandin* to property, a move that would all but eliminate prisoners' property claims. Looking instead at prisoner rights litigation as a whole, it is clear that it is both unnecessary and inappropriate to completely sacrifice a prisoner's constitutional right in the name of judicial efficiency and deference. As the law currently stands, the Supreme Court has spoken only on liberty interests of inmates, an interest of distinct analysis and character from property. Therefore, courts should recognize that *Hewitt* continues to be the appropriate analysis for inmates' property interests because it looks to the sources of independent law which create them. This analysis will not only be faithful to the Supreme Court's decision in *Sandin*, but will help to safeguard an important constitutional right for this large and vulnerable segment of the American population.

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270. See Schlanger, supra note 76, at 1575 (stating that in 1995, inmates filed about thirty-five times as frequently as noninmates in federal courts). But see supra note 76 (discussing how inmate-noninmate disparity disappears when state courts are factored in as well).